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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 297.

CHARLES KERRISON, ASSIGNEE OF EDWIN L. KERRISON, HERMAN LEIDING, ET AL., APPELLANTS,

vs.

A. T. STEWART, FRANCIS WARDEN, AND GEO. FOX, LATE COPARTNERS AS A. T. STEWART & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

WB

FILED APRIL 23, 1875.

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Appeal

Chief Justice

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1 THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1873, before the honorable Hugh L. Bond and the honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court, according to the form of the act of Congress in such case made and provided, the following proceedings were had:

CHARLES KERRISON, ASSIGNEE OF KERRISON & LEIDING,
vs.
A. T. STEWART ET AL., CREDITORS OF KERRISON & LEIDING.

Be it remembered that on the twenty-third day of December, in the year of our Lord one thousand eight hundred and seventy-two,
2 came Charles Kerrison, assignee of Kerrison & Leiding, complainant, by Messrs. Porter & Conner, his solicitors, and filed in the office of the clerk of the circuit court of the United States for the district of South Carolina, at Charleston, in said district, his bill of complaint and subpœna ad respondendum against A. T. Stewart et al., creditors of Kerrison & Leiding, as follows:

Subpœna.

Subpœna ad respondendum.

UNITED STATES OF AMERICA,
State of South Carolina:

The President of the United States to Alexander T. Stewart, Francis Warden, and George Fox, copartners, doing business as merchants in the city and State of New York under the firm of A. T. Stewart & Co.; Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noyes, and Harvey W. Gridley, copartners, carrying on business as merchants in the city and State of New York under the firm of Gardner Brewer & Co.; Lewis Switzer and John A. Switzer,
3 copartners, carrying on business in the State & city of New York under the firm of Lewis Switzer & Co.; William H. Lee, Justice A. Bliss, Orlando Downan, Gordon McTaggart, and George D. Pitkin, copartners, lately carrying on business as merchants in the city and State of New York under the firm of William H. Lee & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, copartners, carrying on business as merchants in the city and State of New York under the firm of Lord & Taylor; Arthur W. Jaffray and Edward S. Jaffray, who have survived John R. Jaffray and Richmond W. Jaffray, late copartners, carrying on business in the city and State of New York under the firm of J. R. Jaffray & Sons; Thomas Cochran, William Barbour, , lately copartners, carrying on business as merchants in the city and State of New York under the firm of Cochran & Co.; William Paton, William McKenzie, Thomas C. M. Paton, John L. Ludlum, and Jonathan Longmire, late copartners, carrying on business in the city and State of New York under the firm of Paton & Co.; William J. Horstmann, Sigismund

H. Horstmann, and Henry V. Allien, copartners, carrying on
4 York, under
the firm of Horstmann Bros. & Allien; Benjamin H. Hutton, who hath survived James Benkard, lately copartners, carrying on business as merchants in the city and State of New York under the firm of Benkard & Hutton; John Slade, John M. Slade, and Francis H. Slade, copartners, carrying on business in the city and State of New York under the firm of John Slade & Co.; Peleg Hall, of the city and State of New York; Seth G. Babcock, of the city and State of New York; F. Junot, of the city and State of New York, and Frederick Phillips & Co.; Gorudfinn & Co.; Henry Walton; Haselhurst & Smith; Babcock & Milnor; Stone & Co.; Babcock & Pouray; estate of Richard Hasbuck; Jenkins & Huntington; William Bunner & Co.; E. L. Bowles; Patton, Stewart & Co.; M. D. Benjamin & Co.; J. & H. Anchincloss; Amos King, Mairs & Co.; Salisbury Mills.

You are hereby strictly commanded and firmly enjoined that, all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South
5 Carolina, at Charleston, on the day of thereof; then and there true and perfect answer to make upon your corporal oath upon the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of Charles Kerrison, assignee of Edwin L. Kerrison and Herman Leiding, formerly copartners in trade, residing and doing business in the city of Charleston, State of South Carolina, under the firm of Kerrison & Leiding.

And also that you do, on the rules-day next immediately after the day appointed and expressed, file, or caused to be filed, in the registry of the said court, your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States of America, at Charleston, in South Carolina, district aforesaid, the twenty-third day of December, in the year eighteen hundred and seventy-two, and in the ninety-seventh year of the sovereignty and Independence of the United States of America.

6 PORTER & CONNER,
Complts. Solrs.
DANL. HORLBECK,
C. C. C. U. S. for S. C.

Which subpœna was returned and endorsed as follows:

And afterwards, to wit, on the 17th February, 1873, the said defendants enter their appearance in said court to said bill in the words and figures following, to wit: We appear for Messrs. Patton & Co., M. D. Benjamin & Co., William H. Lee & Co., Lewis Switzer & Co., Cochran & Co., Gourdfrieres & Co., and accept service of this subpœna for the same.

February 17th, 1873.

McCRADY & SON.

Bill in equity.

7 UNITED STATES OF AMERICA,
District of South Carolina:

To the honorable the judges of the circuit court of the United States for the district of South Carolina, sitting in equity.

Charles Kerrison, a citizen of the State of South Carolina, brings his

bill as assignee of Edwin L. Kerrison and Herman Leiding, formerly copartners in trade, residing and doing business in the city of Charleston, in the same State aforesaid, who have been adjudged bankrupts in the district court aforesaid, against Alexander T. Stewart, Francis Warden, and George Fox, merchants and copartners, doing business in the city and State of New York under the firm of A. T. Stewart & Co.; Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noyes, and Harvey M. Gridley, merchants and copartners, doing business in the city and State of New York under the firm of Gardner, Brewer & Co.; Lewis Switzer and John A. Switzer, merchants and copartners, doing business in the city and State of New York under the firm of Lewis Switzer & Co.; William H. Lee, Justice A.

8 gart, and George D. Pitkin, copartners, lately carrying on business as merchants in the city and State of New York under the firm of William H. Lee & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, carrying on business as merchants in the city and State of New York under the firm of Lord & Taylor; Arthur W. Jaffray and Edward S. Jaffray, who have survived John R. Jaffray and Richmond W. Jaffray, late copartners carrying on business in the city and State of New York under the firm of J. R. Jaffray & Sons; Thomas Cochran, William Barbour,

lately copartners, carrying on business as merchants in the city and State of New York, under the firm of Cochran & Co., William Paton, William MacKenzie, Thomas C. M. Paton, John L. Ludlum, and Jonathan Longmire, late copartners, carrying on business in the city and State of New York, under the firm of Paton & Co.; William J. Horstmann, Sizismund H. Horstmann, and Henry V. Allien, copartners, carrying on business in the city and State of New York, under the firm of Horstman Bros. & Allien; Benjamin H. Hutton, who hath survived James Benkard, lately copart

9 city and State of New York, under the firm of Benkard & Hutton; John Slade, John M. Slade, and Francis H. Slade, copartners, carrying on business in the city and State of New York, under the firm of John Slade & Co.; Peleg Hall, of the city and State of New York; Seth G. Babcock, of the city and State of New York; F. Junet, of the city and State of New York; and also the following-named firms, the individual names of the partners whereof are not known to your orator, but whose individual names, when ascertained, he prays may be herein inserted: Frederick Phillips & Co., Gorudferin & Co., Henry Walton, Haselhurst & Smith, Babcock & Milnor, Stone & Co., Babcock & Pomeroy, Estate of Richard Hasbuck, Jenkins & Huntington, William Brumer & Co., E. L. Bolles, Patton, Stewart & Co., M. D. Benjamin & Co., J. & H. Auchincloss, Amos King, Mairs & Co., Salisbury Mills,

10 creditors of the said Edwin L. Kerrison and Herman Leiding, persons claiming adverse interests touching the real and personal property or right of the said Edwin L. Kerrison and Herman Leiding, now vested in the plaintiff as assignee.

And thereupon your orator complains and says:

That the said E. L. Kerrison and H. Leiding, copartners as aforesaid, did, on the sixth day of April, in this present year of our Lord 1872, file their petition in the bankrupt court of the district aforesaid at Charleston, praying that they might be adjudged bankrupts within the purview of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March

the 2nd, 1867, and thereupon were adjudged bankrupts, and in due course your orator was chosen assignee, and his choice confirmed by his honor George S. Bryan, judge of the district court, and the assignment of all the property, real and personal, mentioned and described in the schedules of the said bankrupts, were duly made to him; that the valuable part of this property consisted of the sum of
11 belonging to the said bankrupts in the hands of your orator, upon which there was no lien, and another sum of , being the rents and profits of the said real estate conveyed in the said conveyance, held by your orator as trustee under the said conveyance; but the real estate and furniture and household goods and chattels are claimed by different creditors to be bound by their liens as follows:

1. The first claim is made by certain creditors under a conveyance made by the said bankrupts, both as partners and individuals mentioned in their schedule, on the day of , in the year of our Lord one thousand eight hundred and sixty-seven, to your orator, with the habendum in these words:

"To have and to hold all and singular the premises unto the said Charles Kerrison, his heirs and assigns forever. In trust nevertheless, and to, and for, and upon, the several uses, intents, trusts, and purposes, and subject to the several provisos, conditions, and limitations hereinafter expressed and declared of and concerning the same; that is to say, in trust, nevertheless, in the first place to hold the said premises as a security for the several and respective parties, creditors of the
12 said Kerrison & Leiding, named in the first section of the schedule hereunto annexed, for the several and respective sums set opposite to their names with interest as above recited; and also for such other parties, creditors of the said Kerrison & Leiding, the names of which are, as is believed and intended to be, correctly stated in the second section of the said schedule hereto annexed; who, at any time before the 1st day of December next, in lieu and satisfaction of their claim shall take and accept the notes of the said Kerrison and Leiding, bearing the same date, 1st December, 1866, payable at the same time (two and three years after date,) with interest from the same, (1st June, 1865,) each note for one-half the principal due such creditors as the creditors named in the first section of the said schedule have taken and accepted, and thereupon the proper amounts shall be set opposite the names of the said creditors named in the second section of the said schedule. And in the next place, in trust, unless the said notes be paid by the parties hereto of the first part in the mean time, then, at public or private sale, to sell and dispose of all and singular the premises aforesaid, or so much thereof as
13 required by mortgage (if practicable) in due time to provide for the payment of the said notes as they shall fall due, together with all proper charges, expenses, and commissions to be allowed to the said Charles Kerrison, which commissions shall not exceed five per cent. upon the amount of sales or sums raised by mortgage. Or if he, the said Charles Kerrison, shall deem it best for the interest of all, then to sell and dispose of the said premises, or any of them, at any time after the execution and delivery of these presents as he may think proper, for cash or on such credit as may enable him to meet the said notes at maturity; and, if he should so sell for cash, or for cash and credit, before the maturity of the said note, then, after paying and retaining all proper charges, expenses, and commissions, to pay the clear residue of the cash so received by him to the parties or holders of the said notes in average and proportion to the several and respective

amounts due upon the said notes, if the cash be not sufficient to pay the whole thereof, and in the same way to pay the proceeds of sale of the whole property, (less charges, commissions, and expenses,) pro rata,

14 the said notes in full at their maturity. And a covenant in these words:

"And it is hereby lastly expressly declared, covenanted, and agreed, by and between the parties hereto of the first and second parts, as follows: that is to say, that in case all the creditors named in the second section of the schedule hereunto annexed, shall come in before the first day of December next, and accept the notes of the said Kerrison and Leiding, in lieu of their claims, as is hereinbefore provided for, that then in that case the said Edwin L. Kerrison and Herman Leiding shall and will procure the renunciations of the contingent dowers of their respective wives in and to the premises hereinbefore conveyed to the said Charles Kerrison, in trust as aforesaid, to be duly made and certified, so as to bar their said wives effectually from claiming dower therein; or failing so to do, that then they shall and will put into the hands, possession, power, and control of the said Charles Kerrison, personal assets sufficient to secure and keep him harmless and safe from loss which might arise from his, the said Charles Kerrison's, covenant to indemnify the purchasers of any of the said premises

15 deed against such contingent rights of dower. And the said Charles Kerrison, on his part, for himself, his heirs, executors, and administrators, covenants and agrees with the parties of the first part hereto, that upon the receipt of such sufficient assets he will thenceforth make and execute to all the purchasers of any of the premises which he may sell and convey under the provisions of this deed such covenants of indemnity against said contingent rights of dower as may reasonably be required by such purchasers and properly devised by their counsel learned in the law."

And the said deed was duly recorded in the registry of mesne conveyance at Charleston, Columbia, and Sumter, according to the registry laws of the State of South Carolina at that time. And Herman Leiding, one of the said bankrupts, also conveyed a lot or tract of land in or near Ashville, North Carolina, with the same habendum, which was also duly recorded at Ashville, according to the registry laws of the State of North Carolina at that time. Under these deeds all the creditors who accepted them, as herein before mentioned, except

16 said real estate was then pledged and bound to them, and that they are now entitled to have the same sold for their benefit, and the proceeds paid to them pro rata, if the said proceeds be not sufficient to pay them in full. A copy of the said conveyances are herewith filed as an exhibit, numbered —.

The second claim is that of A. T. Stewart & Co. The said claimants, after the said bankrupts had made proposals to their said creditors, but before their conveyance had actually been executed, to wit, on or about the day of August, , commenced their action at law against the said bankrupts as partners in this honorable court, in the year of our Lord 1866, at Charleston, and afterwards brought the said cause on for trial at Greenville, where a verdict was obtained against the said bankrupts on or about the day of September, 1866, for the sum of , upon which judgment was entered up on the day of for $, the debt and costs, and execution was there-

upon sued out and returned nulla bona by the marshal, as will more fully appear upon reference to an exemplification of the
17 exhibit marked .

That soon after the said return of the said execution the said A.T. Stewart & Co. filed their bill of complaint in the court of common pleas for the county of Charleston, in the State aforesaid, against the said bankrupts, and your orator, and Paton & Co., and Hutton, survivor of Benkhard & Hutton, the two last as representatives of the creditors who had accepted the said deed to your orator, and praying that the said deed might be decreed to be cancelled, or a sufficient amount of the real estate conveyed thereby might be sold and the proceeds of sale applied to the satisfaction of their (the said A. T. Stewart & Co.'s) claim, and also for injunction and answers. That the said bankrupts and your orator were duly served with subpœna, and answered the said bill, and publication for the other defendants to answer was made, but these defendants never answered, and thereupon a decree pro confesso was taken against them, under a statute of the said State of South Carolina.

That in due course the said suit in equity came to a hearing be-

18 time during the spring term of 1870, who thereupon, on the 22nd day of June after, (1870,) decreed that the conveyance dated the first of May, 1867, executed by Edwin L. Kerrison and Herman Leiding to Charles Kerrison, trustee, was made with intent to defraud the creditors of the said Kerrison & Leiding, and is void as against the complainants. And it was further ordered that the complainants recover of the defendants, Edwin L. Kerrison and Herman Leiding, the costs of the suit, and that they have leave to enter up judgment and issue execution for the same.

That from this decree an appeal was taken to the supreme court of the said State, which appeal was heard at the April term, 1871.

And on the day of March afterwards, (1872,) the said supreme court ordered that the said appeal be dismissed and the decree of the circuit court be affirmed; copies of which proceedings are herewith filed as an exhibit, numbered .

That on or about the day of April afterwards, (1872,) the United States marshal, upon another or the same execution upon the judgment

19 all the real estate contained in the said deed, situated in the city of Charleston, and advertised the same for sale on the first Monday and Tuesday of the next month, (May, 1872;) but before the day of sale an order was made in the court of bankruptcy, at the instance of your orator, that the same should be stayed, and the sale was not made.

That some time day of last, (1872,) certain of the creditors of the bankrupts, who had accepted the security of the deed of conveyance to your orator, filed their petition in the court of bankruptcy setting out the conveyance, that they had accepted it, and that they were entitled to have it all sold and the proceeds paid to them in full, or on account of their respective claims, and praying that the said property should be sold, and if the proceeds did not satisfy their claims, then that they should be allowed to prove for the balance against the general estate, which petition has not yet been answered by your orator.

That the said claims of the said creditors who accepted the convey-

claim of the said A. T. Stewart & Co. under the judgment, are

upon the whole real estate in this State; and both sets of claimants are claiming adverse interests touching the said real estate now vested in your orator; and in and under the premises of the third clause of the second section of the act of Congress aforesaid, your orator has a right to bring this his bill in equity in this honorable court, to have his rights as assignee and the conflicting claims of the said defendants adjudged, so that he may be able to proceed with the settlement of the estate of the said bankrupts in his hands. In consideration whereof he himself prays that the said Frederick Phillips & Co., William H. Lee & Co., Paton & Co., John Slade & Co., Lewis Switzer & Co., Peleg Hall, Gorudfirm & Co., Henry Walton, Hazelhurst & Smith, Babcock & Milnor, Stone & Co., Babcock & Powray, Cochran & Co., Estate of Richard Hasbuck, Horstman Brothers & Allien, Jenkins & Huntingdon, J. R. Jaffray & Sons, William Brumer & Co., E. L. Bolles, Paton, Stewart & Co., M. D. Benjamin & Co., J. & H. Auchincloss, Amos King, Mairs-

vie, Harding & Co., Morton, Grinnell & Co., William A. Drown & Co., Benkard & Hutton, and Lord & Taylor; and the said A. T. Stewart & Co. may answer the premises, and that their respective rights and claims in and to the said real estate may be determined, and shall be adjudged whether the said parties who accepted the said conveyance have prior right and claim in and to the said real estate and its rents and issues, and are to have the proceeds of the sales of the said property paid to them, or whether the said A. T. Stewart & Co. have prior right and claim to the said property and the proceeds thereof should be applied to the payment of their judgment before any part thereof can be applied to the payment of the creditors who accepted the said conveyance; and also whether the household furniture and goods and chattels in the bankrupts' schedules bound by the judgment and execution of the said A. T. Stewart & Co., and they entitled to the proceeds thereof to and towards the payment of the said judgment in preference to all other creditors, and that your orator may be directed by this

ner he is to pay and dispose of the proceeds of the said property, so that he may fully discharge his duties and be discharged from all further duty and liability in respect thereto; and that your orator may have such further and other relief in the premises as to your honors shall seem meet and his case require.

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Alexander T. Stewart, Francis Warden, and George Fox, merchants and copartners doing business in the city and State of New York, under the firm of A. T. Stewart & Co.; Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noyes, and Harvey W. Gridley, merchants and copartners doing business in the city and State of New York, under the firm of Gardner Brewer & Co.; Lewis Switzer and John A. Switzer, merchants and copartners doing business in the city and State of New York, under the firm of Lewis Switzer & Co.; William H. Lee, Justice A. Bliss, Orlando Downan, Gordon McTaggart, and George D. Pitkin, copart-

chants in the city and State of New York, under the firm of William H. Lee & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, copartners carrying on business as merchants in the city and State of New York, under the firm of Lord & Taylor; Arthur W. Jaffray and Edward S. Jaffray, who have survived John R. Jaffray and Richmond W. Jaffray, late copartners carrying on business in the city and State of New York,

under the firm of J. R. Jaffray & Sons; Thomas Cochran, William Barbour, , lately copartners carrying on business as merchants in the city and State of New York, under the firm of Cochran & Co.; William Paton, William Mackenzie, Thomas C. M. Paton, John M. Ludlum, and Jonathan Longmire, late copartners carrying on business in the city and State of New York, under the firm of Paton & Co.; William J. Hoostmann, Sigismund H. Hoostmann, and Henry V. Allien, copartners carrying on business in the city and State of New York, under the firm of Hoostmann Bros. & Allien; Benjamin H. Hutton, who hath survived James Benkard, lately
24 merchants in the city and State of New York, under the firm of Benkard & Hutton; John Slade, John M. Slade, and Francis H. Slade, copartners carrying on business in the city and State of New York, under the firm of John Slade & Co.; Peleg Hall, of the city and State of New York; Seth G. Babcock, of the city and State of New York, and F. Junet, of the city and State of New York; and also to the said Frederick Phillips & Co., Gorudfinn & Co., Henry Walton, Haselhurst & Smith, Babcock & Milnor, Stone & Co., Babcock & Pouray, Estate of Richard Hasbuck, Jenkins & Huntingdon, William Brumer & Co., E. L. Bolles, Patton, Stewart & Co.,-M. D. Benjamin & Co., J. & H. Anchincloss, Amos King, Mairs & Co., Salisbury Mills; thereby commanding them, by a certain day, and under a certain penalty therein to be inserted, personally to be and appear before your honors in this honorable court, then and there to answer the premises, and to stand
25 cree therein, as to your honors shall seem agreeable to equity and good conscience.

And your orator will ever pray, and so forth.

CHAS. KERRISON,
Assignee.
PORTER & CONNER,
Comp'ts' Solrs.

And on the 30th December, A. D. 1873, came into court the said Paton & Co., M. D. Benjamin & Co., F. Junet, William H. Lee & Co., Lewiz Switzer & Co., Cochran & Co., Gourd Freres & Co., Babcock & Pomeroy, and John Slade & Co., by McCrady & Son, their solicitors, and filed their answer to the said bill of complaint, which answer is in words and of the tenor following:

Answer.

The United States of America, fourth circuit, district of South Carolina.
In equity.

The joint and several answer of William Paton, William Mackenzie, Thomas C. M. Paton, John L. Ludlum, and Jonathan Longmire, late copartners carrying on business in the city and State of New York, under the firm of Paton & Co.
26 James Benkard, lately copartners carrying on business as merchants in the city and State of New York, under the firm-name of Benkard & Hutton; M. D. Benjamin & Co., F. Junet, William H. Lee, Justice A. Bliss, Orlando Downan, Gordan McTaggart, and George D. Pitman, copartners lately carrying on business as merchants in the city and State of New York, under the firm of William H. Lee & Co.; Lewiz Switzer and John A. Switzer, mer-

chants and copartners doing business in the city and State of New York, under the firm of Lewiz Switzer & Co.; Thomas Cochran, William Barbour, lately copartners carrying on business as merchants in the city and State of New York, under the firm of Cochran & Co.; Gourd Freres & Co., Babcock & Pomroy, John Slade, John M. Slade, and Francis M. Slade, copartners carrying on business in the city and State of New York, under the firm of John Slade & Co., some of the defendants who are impleaded with Alexander T. Stewart; Francis Warden and George Fox, merchants and copartners doing business in
27 the city and State of New York, under the firm of A. T. Stewart & Co., and others named in the bill of complaint of Charles Kerrison, a citizen of the State of South Carolina, as assignee of Edwin L. Kerrison and Herman Leiding, bankrupts.

These defendants, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception to the manifold errors, uncertainties, imperfections, an' insufficiencies in the said complainants' said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as they, these defendants, are advised is material for them, these defendants, to make answer unto, they, these defendants, answering say:

They admit all the facts stated in the plaintiff's bill of complaint, and that all the copies of papers filed with it are correct copies of the papers they are said to be copied from without admitting the said original papers to be of any other force and effect between and among the parties thereto than hereafter may appear; but they say that they, these defendants,
28 ings alleged and set forth, unless the defendants, Paton & Co., should be so considered upon the facts hereinafter stated, and they are not bound or estopped by them or any of them, nor can they or their rights in any manner whatever be prejudiced by the said proceedings or by any pretended decrees or judgment therein supposed to have been pronounced or rendered.

And these defendants further answering say: That the conveyancies in trust to Charles Kerrison were, according to modern usage, apt and proper conveyancies by way of mortgage to secure the debts due by Kerrison & Leiding to these defendants and others, and were bona fide mortgages and securities for that purpose, to which these defendants, having become parties in good faith by accepting the same, now have good right to resort for payment of their respective claims against the late firm of Kerrison & Leiding, and that notwithstanding the decrees of the circuit court and of the supreme court of the State of South Carolina, these defendants not being parties in the cause in which the said decrees were rendered.

And these defendants further
29 That what is mentioned and described as the judgment of A. T. Stewart & Co. against Kerrison & Leiding, in the complainant's bill of complaint, and is said to be set forth in the exhibit filed with the said bill, as Exhibit , purporting to be an exemplification of the same according to and upon the face of the said exhibit, is no judgment at all, but a mere nullity, as would appear upon inspection of the same, if the same were indeed an exemplification.

That, under the act of Congress approved 24 September, 1789, known as the judiciary act, the State of South Carolina was constituted one district, and called South Carolina district, and made one of the districts of the southern circuit; and the sessions of the circuit court in the said district were directed to be holden alternately at Columbia and

Charleston, and there was no authority for holding any session of the said circuit court anywhere else in the said State.

That by another act of Congress approved 21 February, 1823, entitled "An act to divide the State of South Carolina into two judicial districts," the said State was divided into two districts in the manner following, that is to say: The districts of Lancaster, Chester, York, Union, Spartanburgh, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield should compose one district, to be called the western district; and the residue of the State should form one other district, to be called the eastern district, and the terms of the said district court for the eastern district should be held in Charleston; and that for the trial of all such criminal and civil causes as were by law cognizable in the district courts of the United States, which might thereafter arise or be prosecuted or sued within the said western district, there should be one annual session holden at Laurens Court-House.

That by this division of the State into two districts, both places for holding sessions of the circuit court were in the eastern district, and there was no place of holding session of the said court within the territorial limits of the western district.

That by another act of Congress approved 16 August, 1856, the place of session of the district court for the western district was changed, and the said district court was directed to be holden at Greenville Court-House on the first Monday of August in each year; and the third section of this same act enacted that "the said district court for Greenville, in addition to the ordinary powers of a district court of the United States, shall have jurisdiction of all causes (except appeals and writs of error) which now are or may be hereafter made cognizable in a circuit court of the United States, and shall proceed in the same manner as a circuit court."

That a writ entitled "sixth circuit" of the United States of America, South Carolina district, tested in the name of the Chief-Justice of the United States, was sued out by the said A. T. Stewart & Co. on or about the first Monday of August, A. D. 1866, against the said Kerrison & Leiding, in an action of assumpsit, returnable before the clerk of the circuit court of the United States of America for the aforesaid circuit and district, at the rules to be holden at Charleston, in the aforesaid district, on the first Monday in September next thereafter, upon which last-mentioned day the said Kerrison & Leiding appeared by their attornies before the said clerk, and entered their appearance; and that afterward, to wit, on the fourth day of December, in A. D. 1867, the said A. T. Stewart & Co. filed their declaration at the same place, and the defendants filed their plea of non-assumpsit; and thereupon issue was joined in the said cause in the said court at Charleston, in the district and circuit aforesaid, and that no further record of the said proceedings in the said court is thereafter exemplified; but that thereupon it appears by the said exhibit a writ in the form of a writ of venire facias was issued, summoning a jury to appear before the justice of the said court to be holden at Greenville on the first Monday of August next thereafter; at which place the said circuit court was not, nor were the justices thereof, authorized to sit by any act of Congress or any law whatever; and that the verdict set forth in the said exhibit was rendered at Greenville on the 21 day of August, A. D. 1868, by a jury summoned by that writ, and there empanelled, and upon that verdict the pretended judgment was entered up against the said Kerrison & Leiding, at Greenville, in the district court sitting there;

33 which court was not the same court in which the said suit was commenced and was then pending, but was another seperate and distinct court; that is to say, a district court for the western district of the said State, holden by the district judge only having circuit-court powers for causes arising and being prosecuted or sued within the said western district and no other; so that the said court then sitting at Greenville had no cognizance of or jurisdiction over the said cause, which was a cause not arising, pending, or sued in the western district, but a cause in a different district and a higher court; that is to say, in a circuit court of the United States, with original powers and jurisdiction, holding its terms and sessions at Columbia and Charleston only.

And these defendants, further answering, say:

That they are informed and believe that the suit in which the pretended judgment is said to have been entered up was a suit in the eastern district of the State of South Carolina, wherein Kerrison and Leiding resided, in the United States circuit court, which sat as here-
34 inbefore stated, alternately at Columbia and Charleston, but the records of which were all kept in the office of the clerk of the district court of the said district, who was then, according to law, clerk also of the said circuit court by virtue of his said office of clerk of the said district court, which office was in the city of Charleston, where the clerk who was thus clerk of both courts always resided.

That the said cause was regularly at issue in the said circuit court, upon issues both of law and of fact, on or about the fourth day of December, in the year of our Lord 1867, and was then or soon thereafter docketed upon the docket of the said court.

That the declaration contained many counts, the two first of which were upon judgments which had been recovered in the New York State courts upon suits in which only one of the partners of Kerrison & Leiding had been served with process.

That the defendants' demurred to the two first counts specially, because they were in assumpsit instead of being in debt, and the
35 plaintiffs joined in the demurrer; that to other counts defendants pleaded specially that the causes of actions counted on were merged in the judgments counted on in the two first counts, and the plaintiffs demurred to these pleas, and the defendants joined in demurrer; that the said cause was set down for trial at the next April term of the said court at Charleston, and argued upon the issue of law.

That the defendants' demurrer to the two first counts was argued before his honour the presiding judge, Judge Bryan, on the 30th day of June, in the said term, who overruled the demurrer and sustained the said counts.

That the demurrer of the plaintiffs to the defendants' special pleas was argued before the same judge on the third day of July, in the same term, when the plaintiff's demurrer was sustained, and the special pleas overruled, and that the cause then stood upon the docket for trial on the general issue, which was not tried at that term, and the cause was continued generally.

That in the following August the said docket of the said court was taken up to Greenville, in the said State, at which place, on
36 the first Monday of that month, the district court for the western district of the said State was to be held by the district judge of South Carolina alone, according to law, which court had circuit-court jurisdiction and powers over the said western district, and the causes there arising or there prosecuted or sued, but had no

jurisdiction whatever over the eastern district or over any causes there pending or pending in the circuit court of the United States for the said eastern district or State, yet the said district court for the western district of the said State, and his honour the judge then and there presiding, assumed and asserted the right, and exercised his power as a judge, to call the said docket of the circuit court, and required the parties whose causes stood upon the said docket for trial in the said circuit court, and the said Kerrison & Leiding, among others, to go to trial at that place, Greenville aforesaid, and in that court and before a jury of that district, upon the pleadings in the said cause as they then stood,
37 and that upon that trial the verdict mentioned and set forth in the exhibit filed with the complainant's said bill of complaint was given by a jury of the said western district, and the alleged judgment thereon entered up.

And these defendants aver that the said court had no jurisdiction in or over the said cause, and had no right or authority to require the attendance of the said parties defendant before the said court at the time and place aforesaid, or at any other time or place, or to require them to go to or to submit to a trial then and there, and that the said parties could not, by any act or consent of theirs, confer a jurisdiction upon the said court which it had not by law; and further, that the said parties defendant in giving their attendance upon the said court at the time and place aforesaid, and submitting to the trial thereupon the judicial demand and requisition of a judge and a court claiming submission to its orders and authority and right to enforce such orders as a judicial
38 right and power cannot be said or construed to have waived any lawful objection to the unauthorized action, orders, or mandate of such judge and court, or to have consented to anything on their part which they might otherwise have had the right and power to consent to, and that the said judgment is void even as to the parties defendant thereto and a mere nullity; and these defendants further submit and insist that even if the said judgment be of any force or effect whatever against the defendants in the said judgment, it is of no force or effect against these defendants, their rights, interests, or estates, and that it is no lien upon the lands and tenements conveyed by the said Kerrison & Leiding to the said Charles Kerrison by way of mortgage for the security and benefit of these defendants, who are the mortgagees in fact and in equity under the said deed, and have a prior lien by contract for valuable consideration upon all the said lands, and if they had no such lien they have as creditors of the said Kerrison & Leiding good right to insist in these proceedings that there is no such judg-
39 ment as is pretended, and to have the same declared and decreed to be null and void and to require other co-defendants, A. T. Stewart & Co., if such order should be held to be necessary as matter of form, to enter an order in the court wherein the said judgment is said to be of record, that the same be set aside and vacated; and they likewise submit and insist that the lands in the hands of the complainant, as assignee of Kerrison & Leiding, are not bound by the said pretended judgment, and could not be levied upon or sold under any execution which should issue thereupon.

And these defendants, William Paton, William Mackenzie, Thomas C. M. Paton, John L. Ludlum, and Jonathan Longmire, late copartners, carrying on business in the city and State of New York under the firm of Paton & Co.; and Benjamin H. Hutton, who hath survived James Bankard, lately copartners carrying on business as merchants in the city

and State of New York, under the firm-name of Bankard & Hutton; answering for themselves only and not for the others, say:

40 That they are not bound by the decree in the cause of A. T. Stewart & Co. against Charles Kerrison and Kerrison & Leiding, although they might have been named among the defendants in the bill of complaint, because they say they were absent from the State of South Carolina and were never made parties to the said cause in any other manner than by publication in the newspapers of the said State, under a special act of the general assembly of the said State, and were neither citizens nor residents of the said State, but were then and still are citizens of the State of New York, and were absent from the State of South Carolina at the commencement of the said suit, during all the time it was pending and when said decrees were given and pronounced, even up to this present time, and were never personally subject to the jurisdiction of the courts of South Carolina, and are not precluded in their proper persons from denying the validity of the said decrees, even if the said decrees can be construed to affect the title of the property situate in the said State in which these defendants are interested; which property, however, stands at this time precisely in the same condi-

41 tion, without any change whatever as to the parties interested therein, (all of whom are parties to this cause,) as it did at and before the date of the said decrees.

And further, that if they were bound by the said decree in respect to the said lands, by the provisions of the said act of the general assembly of the said State of South Carolina, they are allowed and had and have two years from and after the decree of the supreme court of the said State, that is to say, until the eighteenth day of March, in the year 1874, to come in and show cause against the said decree, and that before that time was expired the bankrupts, the said Kerrison & Leiding, by their application to this court and by the adjudication of the court of bankruptcy, on their petition, took the case out of the jurisdiction of the courts of the State of South Carolina, wherein these defendants could not thereafter apply and show cause against the said decree; and having been called into this court where all the parties in interest in the whole subject-matter are made parties, these defendants are now

42 at liberty to make their objections to the said decrees in this honourable court, as they now crave leave to do, and to join with their co-defendants herein named in so doing.

And the said defendants say, that the said decrees were given upon the allegations of the bill of complaint of the said A. T. Stewart & Co., among which was the material allegation without which his said complaint could not have been sustained; that they, the said A. T. Stewart & Co. had recovered, and at the time of their bill filed had a judgment, in this honourable court, upon which they had sued out an execution of fieri facias, which had been returned nulla bona, when in fact, as has hereinbefore made to appear, there was no such judgment or no valid judgment in this honourable court, and this alone is and would be sufficient cause for setting aside and vacating the said decrees as to all these defendants.

All which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honourable court shall direct; and hereby prays to be hence dismissed with their reasonable costs and charges in their behalf most wrongfully sustained.

43 And, on the 30th December, A. D. 1873, came into court the said Alexander T. Stewart, Francis Warden, & George Fox, late copartners under the name of A. T. Stewart & Co., by Pressley, Lord &

Inglesby, their solicitors, and filed their answer to the said bill of complaint, which answer is in words and of the tenor following:

6—*Answer.*

THE UNITED STATES OF AMERICA,
District of South Carolina, fourth circuit:

CHARLES KERRISON, ASSIGNEE OF KERRISON & Leiding, *vs.* A. T. STEWART & CO., ET AL. } Answer of A. T. Stewart & Co.

The joint & several answer of Alexander T. Stewart, Francis Warden, & George Fox, late copartners under the name of A. T. Stewart & Co.

These defendants, now and at all times hereafter saving & reserving to themselves all and all manner of benefit & advantage of exception to the manifold errors, uncertainties, imperfections, and insufficiencies in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as they, these
44 defendants, are advised is material for them, these defendants, to make answer unto, they, these defendants, answering, say:

They admit that the said Edwin L. Kerrison & Herman Leiding did, on the 6th April, A. D. 1872, file their petition in the bankrupt court of the district aforesaid, praying that they might be adjudged bankrupts, & thereupon were adjudged bankrupts, & that in due course the complainant was chosen assignee & his choice confirmed by his honor George S. Bryan, judge of the district court, & the assignment of all the property real & personal mentioned and described in the schedules of the said bankrupts was duly made to him.

Further say that towards the close of the year 1866, the said Kerrison & Leiding, being then indebted to these defendants and other persons to a very large amount for goods & merchandize purchased prior to the late civil war, applied to and requested their creditors to release the interest which had accrued upon their claims prior to the first of June, 1865, & to accept and take their notes, dated the first of
45 December, 1866, payable with interest from the 1st June, 1865, two and three years after the said date, in full discharge of their respective debts.

That these defendants having declined to comply with the said requests, & the said Kerrison & Leiding having induced a majority in number and value of their creditors to accept their offer of compromise, afterwards, to wit, on the first of May, 1867, for the purpose of coercing these defendants to accept the said composition in common with the other creditors, conveyed sundry parcels of land of great value, & composing the entire property of the said Kerrison & Leiding, liable to levy & sale to the complainant, Charles Kerrison in fee, upon the following trusts, that is to say, in trust in the first place to hold the said premises as a security for the several & respective parties, creditors of the said Kerrison & Leiding, named in the first section of the schedule hereto annexed, for the several & respective sums set opposite to their names, with interest as above recited, (to wit, interest from the 1st June, 1865,) and also for such other creditors of the said Kerrison & Leiding, the names of which are, as is believed & intended to be correctly stated in
46 the second section of the said schedule hereunto annexed, who at

at any time before the first of December next, (1867,) in lien & satisfaction of their claim, shall take and accept the notes of the said Kerrison & Leiding, bearing the same date, 1st December, 1866, payable at the same time, two and three years after date, with each note for one-half of the principal due such creditors as the creditors named in the first *in the first* section of the said schedule have taken & accepted, & in the next place in trust, unless the said notes be paid by the parties thereto of the first part in the mean time, then at public or private sale, to sell and dispose of all & singular the premises aforesaid, or so much thereof as may be necessary, or to raise the sum required by mortgage, if practicable, in due time to provide for the payment of the said notes as they shall fall due, together with all proper charges, expenses, & commissions to be allowed to the said Charles Kerrison, which commissions shall not exceed five per centum upon the amount of sales or
47 sums raised by mortgage; or if he, the said Charles Kerrison, shall deem it best for the interests of all, then to sell & dispose of the said premises or any of them, at any time after the execution & delivery of these presents, as he may think proper, for cash or such credit as may enable him to meet the said notes at maturity, & if he should so sell for cash or for cash & credit, before the maturity of the said *said* notes, then, after paying & retaining all proper charges, expenses, & commissions, to pay the clear residue of cash so received by him to the parties or holders of the said notes, in average & proportion to the several & respective amounts due upon the said notes, if the cash be not sufficient to pay the whole thereof, & in the same way to pay the proceeds of sale of the whole property pro rata if the whole be not sufficient to pay the said notes in full at their maturity.

That by said deed no disposition was made of any surplus which might remain of the proceeds of said real estate after paying the creditors who accepted the same, or of the rents & profits of the assigned estate, by reason whereof a trust as to the said surplus & also as
48 to said rents & profits resulted to the said Kerrison & Leiding, who, accordingly, with the assent of the said Charles Kerrison, continued in the absolute control & enjoyment of the said real estate, collected the rents & profits, & applied the same to their own use & not to the payment of their debts.

That at the time of the execution of the said conveyance the said Kerrison & Leiding, in addition to the assigned real estate, were possessed of a large amount of personal property, consisting of choses in action, which they reserved for their own use, & which were wasted & squandered, while these defendants were hindered & delayed in the collection of their just debt.

That these defendants, being advised that Kerrison & Leiding had no right to require them to release a portion of their just demands, & to receive the balance by instalments prescribed by them, under the penalty of being debarred from all participation in the property conveyed to Charles Kerrison, especially while the said Kerrison & Leiding retained for their own use, & under their own control, not only the
49 rents and profits of the assigned real estate, but a large & valuable portion of their personal assets, declined to accept the provisions of the deed.

That these defendants, after the said bankrupts had made proposals to their said creditors, but before their conveyance had actually been executed, to wit, on or about the first Monday in August, 1866, commenced their action at law against the said bankrupts, as partners, in the circuit court of the United States for the district of South Carolina.

That afterwards the said cause was, by consent of parties, transferred to the district court of the United States for the western district of South Carolina; which said court, in addition to the ordinary jurisdiction & powers of a district court of the United States, had jurisdiction of all causes cognizable in a circuit court of the United States, except appeals & writs of error.

That the said cause came on for trial at Greenville, when a verdict was obtained against the said bankrupts on or about the 21st of August, 1868, for the sum of $9,389.79, upon which judgment was entered up on the 28th day of September, 1868, for $9,436.52, the debt & costs,
50 & execution was thereupon sued out & returned, nulla bona, by the marshal, as will more fully appear upon reference to the exemplification of said judgment, filed with the complainant's bill as an exhibit.

That soon after the return of the said execution, these defendants filed their bill of complaint in the court of common pleas for the county of Charleston, in the State of South Carolina, against the said bankrupts, Charles Kerrison, the trustee; Paton & Co., & Hutton, survivor of Bankhard & Hutton; the two last as representatives of the creditors, who had accepted the said deed, praying that the said deed might be cancelled. That the said bankrupts & the said Charles Kerrison were duly served with subpœna, & answered the said bill, & publication for the other defendants to answer was made, but the said Paton & Co. & Bankhard never answered, & thereupon a decree pro confesso was taken against them, under a statute of the said State of South Carolina. That, in due course, the said suit in equity came to a hearing before his honor R. B. Carpenter, who decreed that the conveyance exe-
51 cuted by Edwin L. Kerrison & Herman Leiding to Charles Kerrison, trustee, was made with intend to defraud the creditors of the said Kerrison & Leiding, & was void as against these defendants. That from this decree an appeal was taken to the supreme court of the said State, & was dismissed by the said court, & the decree of the circuit court affirmed.

And these defendants submit that in the said suit the trustees represented the interests of all creditors who accepted the said deed, & that said creditors are bound by the decision made in the said cause, setting aside the conveyance under which they claim as fraudulent & void.

That, on the 9th April, 1872, the United States marshal, under an execution issued upon the judgment obtained by these defendants, levied upon all the real estate contained in the said deed, situated in the city of Charleston, and advertised the same for sale on the first Monday & Tuesday of May, 1872, but before the day of sale an order was made in the court of bankruptcy that the same should be stayed. And these defendants submit that their said judgment & execution constitute the only valid lien upon the real estate of the bankrupts so levied
52 on, and that they are entitled to be paid out of the proceeds thereof in preference to all other creditors.

All which matters & things these defendants are ready & willing to aver & maintain & prove, as this honorable court shall direct, & hereby pray to be hence dismissed with their reasonable costs & charges in this behalf most wrongfully sustained.

PRESSLEY, LORD & INGLESBY,
Defts.' Attys.

And on the 10th day of April, A. D. 1873, came into court the said Charles Kerrison, assignee, complainant, by Porter & Conner, their

solicitors, and filed the following order, which order is in words and of the tenor following:

Order.

In the circuit court.

THE UNITED STATES OF AMERICA,
District of South Carolina:

CHARLES KERRISON, ASSIGNEE OF KERRISON & Leiding, in bankruptcy,
vs.
A. T. STEWART & CO. AND OTHERS.
} Bill in equity for instruction.

Porter & Conner, comp. sol.
Pressley, Lord & Inglesby, McCrady & Son.

53 It appearing that the following persons, parties defendant in this case, are non-residents in this State, but live in the State of New York, on motion of Porter & Conner, it is ordered that the said defendants do appear and answer, plead or demur, within thirty days from this date, or the bill will be taken pro confesso against them, to wit: Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noyes, and Harvey N. Gridley, merchants and copartners, doing business in the city and State of New York under the firm of Gardner, Brewer & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, copartners, carrying on business in the city and State of New York under the firm of Lord & Taylor; Arthur W. Jaffray and Edward S. Jaffray, who have survived John R. Jaffray and Richmond W. Jaffray, late copartners, carrying on business in the city & State of New York under the firm of J. R. Jaffray & Sons; William J. Horstmann, Sigismund H. Horstmann, and Henry V. Allien, copartners, carrying on business
54 in the city and State of New York under the firm of Horstmann Bros. & Allien; Benjamin H. Hutton, who hath survived James Bankard, lately copartners, carrying on business in the city and State of New York under the firm of Bankard & Hutton; Peleg Hall, of the city and State of New York; Frederick Phillips & Co.; Henry Walker; Hazelhurst & Smith; Babcock & Milnor; Stone & Co.; the estate of Richard Hasbuck; Jenkins & Huntington; William Brumer & Co.; E. L. Bolles; Paton, Stewart & Co.; J. & H. Auchincloss; Amoskeag Manufacturing Company; Salisbury Mills, and all other persons interested in the assigned estate of Kerrison & Leiding in bankruptcy.

Further ordered that publication be made once a week for three weeks in the News & Courier of Charleston, the Tribune of New York, & the North American & Gazette of Philadelphia.

Further ordered that John Grimball, esq., of New York, be appointed to serve copy of this order upon such of the defendants
55 as are known to him.

GEO. S. BRYAN,
U. S. Judge Dist. of So. Ca.

10th April, 1873.

REC. 297—2

And on the 1st day of May, A. D. 1873, John Grimball, esq., of New York, made the following return of service, which return is as follows:

Return.

I, John Grimball, in the annexed order named, do hereby certify that I did serve the annexed order on the parties hereinafter named, at the times and places hereinafter mentioned, by delivering to and leaving with said parties copies of said order. I do further certify that I knew said parties to be the parties mentioned and described in said order.

1872.
April 24. Jenkins & Huntington: Served on H. E. Jenkins at No. 36 East 19th street, in the city of New York.
25. Gardner, Brewer & Co.
" Amoskeag Manufacturing Company.
" Salisbury Mills: Served on James S. Noyes, a copartner of the firm of Gardner, Brewer & Co., who declared themselves
56 to be the agents and attorneys of the Amoskeag Manufacturing Company, and of the Salisbury Mills, at No. 62 Leonard street, in the city of New York.
" Burkhard & Hutton: On Benjamin H. Hutton, at No. 144 Duane street, in said city.
" Haselhurst & Smith: On James Haselhurst, at No. 51 White
1873. street, in said city, a copartner of said firm.
April 25. Wm. Brumer & Co.: On Wm. Brumer, at Nos. 85 and 87 Grand street, in said city.
" " J. & H. Auchincloss: On H. Auchincloss, at No. 47 White street, in said city.
" 26. Paton, Stewart & Co.: On David Stewart, liquidating partner, at 119 Broadway, in said city.
" " Babcock & Milnor: On S. D. Babcock, special partner of firm, at 37 William st., in said city.
" " Stone & Co.: On S. D. Babcock, trustee of said firm, at 37 William st., in said city.
28. E. L. Bolles: At No. 70 Broadway, in said city.
57 1873.
April 28. Horstmann, Alien & Bros.: On H. B. Alien, of said firm, at No. 7 Bond street, in said city.
" 23. J. R. Jaffray & Son: On W. Burron, the agent and atty. of said firm, at No. 344 B'way, in said city.

In witness whereof I have hereunto subscribed my name this 1st day of May, 1873.

JOHN GRIMBALL.

And on the 16th day of June, A. D. 1873, came into court the complainants' solicitors, and obtained the following order pro confesso, which is in the following words:

Order pro confesso.

The defendants, Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noyes, Harvey N. Gridley, John S. Lyle, John T. Lord, George W. T. Lord, Arthur W. Jaffrey, Edward S. Jaffrey, William Paton, William McKenzie, Thomas C. M. Paton, John L. Ludlum, Jonathan Longmire, William J. Hartsman, Sigismund H. Hartsman, Henry V.

Allien, Benj. H. Hutton, John Slade, John M. Slade, Francis H. Slade, Peleg Hall, Seth G. Babcock, F. Junet, Frederick Phillips & Co.,
58 Henry Walker, Haseltine & Smith, Babcock & Milnor, Stone & Co., Babcock & Powray, Est. Richard Hasbuck, Jenkins & Huntington, William Brumer & Co., John H. Auchincloss, Amoskeag Man. Co., Salisbury Mills, & Richmond W. Jaffray, having failed to plead, answer, or demur to the said bill of complaint, ordered that the same be taken pro confesso as to them.

June 16th, 1873.

J. E. HAGOOD,
C. C. C. U. S. for Dist. of S. C.

And on the 30th day of December, 1873, came into court McCrady & Son, complainant's solicitors, and with their answer filed the following Exhibit A, which exhibit is in the following words:

Exhibit A.

THE STATE OF SOUTH CAROLINA:

Between Edwin L. Kerrison, Herman Leiding, and Charles Kerrison.

This deed of two parts, made this first day of May, in the year of our Lord one thousand eight hundred and sixty-seven, between Edwin L. Kerrison and Herman Leiding, of the city of Charleston, in the State aforesaid, lately trading together as merchants, copart-
59 ners, under the name and style of Kerrison & Leiding, of the first part, and Charles Kerrison, also formerly merchant, of the same place, of the second part, witnesseth: That whereas, with a view to enable them, the said Kerrison & Leiding, parties hereto of the first part, to resume some mercantile trade or business, a majority of their creditors, both in number and amount or value, have agreed to take their notes, dated the first day of December last, payable, with interest, from the first day of June, that was in A. D. 1865, two and three years after the said date, secured by a conveyance to an approved trustee of the real estate hereinafter fully and particularly mentioned and described, and intended to be conveyed to the said Charles Kerrison, hereto of the second part, in trust, for the better securing of the said notes, a schedule whereof, with the names of the said creditors and the respective amounts of the notes given to each of them, all bearing the date and payable on the days aforesaid, is hereunto annexed and made a part of these presents; and whereas all other the creditors of the said Kerrison and
60 Leiding may be disposed to come in upon the footing of the said agreement and security, and in that event it is intended to secure to them that right, and also to provide for making the security more effectual:

Now this deed further witnesseth: That the said Edwin L. Kerrison and Herman Leiding, parties hereto of the first part, in consideration of the premises and for the better securing their said notes, and such as may be given to their other creditors, and for and in consideration of the covenants and agreements of the said Charles Kerrison, party hereto of the second part, hereafter expressed and made, and also of the sum of five dollars by the said party of the second part to the said parties of the first part paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged by the said parties of the first part, they, the said parties of the first part, have granted, bargain', sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Charles Kerrison

61 [Here follows the description of all the property.]

To have and to hold all and singular the premises unto the said Charles Kerrison, his heirs and assigns forever, in trust, nevertheless, and to and for and upon the several uses, intents, trusts, and purposes, and subject to the several provisos, conditions, and limitations hereinafter expressed and declared of and concerning the same; that is to say, in trust, nevertheless, in the first place, to hold the said premises as a security for the several and respective parties, creditors of the said Kerrison and Leiding, named in the first section of the schedule hereunto annexed, for the several and respective sums set opposite to their names, with interest, as above recited; and also for such other parties, creditors of the said Kerrison and Leiding, the names of which are, as is believed and intended, to be correctly stated in the second section of the said schedule hereto annexed, who, at any time before the 1st day of December next, in lieu and satisfaction of their claim, shall
62 take and accept the notes of the said Kerrison and Leiding, bearing the same date, 1st December, 1866, payable at the same time, (two and three years after date,) with interest from the same, (1st June, 1865,) each note for one-half the principal due such creditors as the creditors named in the first section of the said schedule have taken and accepted; and thereupon the proper amount shall be set opposite the names of the said creditors named in the second section of the said schedule; and, in the next place, in trust, unless the said notes be paid by the parties hereto of the first part in the mean time, then at public or private sale to sell and dispose of all and singular the premises aforesaid, or so much thereof as may be necessary, or to raise the sum required by mortgage, (if practicable,) in due time, to provide for the payment of the said notes as they shall fall due, together with all proper charges, expenses, and commissions to be allowed to the said Charles Kerrison, which commissions shall not exceed five per cent. upon the amount of sales or sums raised by mortgage. Or if he, the said
63 Charles Kerrison, should deem it best for the interest of all, then to sell and dispose of the said premises, or any part of them, at any time after the execution and delivery of these presents, as he may think proper, for cash, or on such credit as may enable him to meet the said notes at maturity; and if he should so sell for cash, or for cash and credit, before the maturity of the said note, then, after paying and retaining all proper charges, expenses, and commissions, to pay the clear residue of the cash so received by him to the parties or holders of the said notes in average and proportion to the several and respective amounts due upon the said notes, if the cash be not sufficient to pay the whole thereof, and in the same way to pay the proceeds of sale of the whole property (less charges, commissions, and expenses) pro rata, if the whole be not sufficient to pay the said notes in full at their maturity. And the said Edwin L. Kerrison and Herman Leiding do hereby bind themselves, their heirs, executors, and administrators as to the p'emises conveyed by them jointly and severally, and as to the premises conveyed by them severally each for himself doth
64 hereby bind himself and his heirs, executors, and administrators to warrent and forever defend all and singular the said premises unto the said Charles Kerrison, his heirs and assigns, against their heirs, executors, administrators, and assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same. And it is hereby lastly expressly declared, covenanted, and agreed, by and between the parties hereto of the first and second parts, as follows, that is to say, that in case all the creditors named in the second section of the schedule hereunto annexed shall come in before the 1st day

of December next and accept the notes of the said Kerrison and Leiding in lieu of their claims, as is hereinbefore provided for, that then, in that case, the said Edwin L. Kerrison and Herman Leiding shall and will procure the renunciations of the contingent dowers of their respective wives in and to the premises hereinbefore conveyed to the said Charles Kerrison in trust as aforesaid to be duly made and certified, so
65 as to bar their said wives effectually from claiming dower therein; or failing so to do, that then they shall and will put into the hands, possession, power, and control of the said Charles Kerrison personal assets sufficient to secure and keep him harmless and safe from loss which might arise from his, the said Charles Kerrison's, covenant to indemnify the purchasers of any of the said premises which he may sell under the power of this deed, against such contingent rights of dower. And the said Charles Kerrison, on his part, for himself, his heirs, executors, and administrators, covenants and agrees with the parties of the first part hereto, that upon the receipt of such sufficient assets he will thenceforth make and execute to all the purchasers of any of the premises which he may sell and convey under the provisions of this deed such covenants of indemnity against said contingent rights of dower as may reasonably be required by such purchasers and properly devised by their counsel learned in the law.

66 In witness whereof the parties hereto have interchangeably set their hands and seals on the day and year first above written.

(Signatures, seals, and probate omitted.)

(Endorsed upon the deed is the following:)

I hereby acknowledge and declare that the parties of the first part in the within deed named have deposited with me personal assets sufficient to indemnify me, and that I am therefore bound by my covenant within to covenant with the purchasers of the premises hereinafter sold by me to indemnify them against the contingent dower of the wives of the said parties of the first part if they do not renounce.

(See schedule on next page.)

MESNE CONVEYANCE OFFICE,
Charleston County, November 11, 1870.

I certify that the within written pages contain a true and correct copy of a deed (the description of property alone excepted) recorded in this office in Book B, No. 15, pp. 526 to 534, on the 23d day of May, 1867.

(Signed) WILLIAM J. McKINLAY,
Register M. C.

Fee, $5.

67 Name of creditors.	Principal sum.	Notes for one-half with interest from 1st June, 1865, due 1st December, 1868.	Notes for one-half with interest from 1st June, 1865, due 1st December, 1869.	We hereby acknowledge the receipt of the notes of Kerrison & Leiding as described opposite our names hereunder.
FIRST SECTION.				
Frederick Phillips & Co	741 02	370 51	370 51	Frederick Phillips & Co.
William H. Lee & Co	4,736 79	2,368 39	2,368 40	William H. Lee & Co.
Paton & Co	4,405 08	2,202 54	2,202 54	Paton & Co.
John Slade & Co	5,244 98	2,622 49	2,642 49	John Slade & Co.
Lewis Switzer & Co	1,267 75	633 87	633 88	Lewis Switzer & Co.
Peleg Hall	1,047 31	523 65	523 66	Peleg Hall.
Gorndfirm & Co., J. A. Leffin, attorney.	2,108 32	1,054 16	1,054 16	Gorndfirm & Co., J. A. Leffin, attorney.
Henry Walton	314 40	157 20	157 20	Henry Walton & Co., per W. H. Walton, attorney.
Haselhurst & Smith	415 43	207 71	207 72	Haselhurst & Smith.
Babcock & Milnor	1,357 29	678 64	678 65	Babcock & Milnor.
Stone & Co., by S. D. B	2,745 42	1,372 71	1,372 71	Stone & Co., by S. D. Babcock.
Seth G. Babcock, agent for claim Babcock & Ponroy.	1,354 57	677 28	677 29	Seth G. Babcock, agent.
Cochran & Co	525 67	262 84	262 85	Cochran & Co.
Est. of Richard Hasbuck, B. & Co	2,318 17	1,159 08	1,159 09	Est. of Richard Hasbuck, by Buckley & Co.
Horstman Bros. & Allien	471 10	235 55	235 55	Horstman Bros. & Allien,
Jenkins & Huntington, in liq	290 06	145 03	145 03	Jenkins & Huntington, per Wm. Howe.
J. R. Jaffray & Sons	1,680 26	840 13	840 13	J. R. Jaffrey & Sons, liquidation, Wm. Barrow.
William Brumer & Co	593 15	296 57	296 58	William Brumer & Co.
68 E. L. Bolles	568 70	284 35	284 35	E. L. Bolles.
Patton, Stewart & Co	604 63	302 31	302 32	Patton, Stewart & Co.
M. D. Benjamin & Co	622 05	311 12	311 03	F. Junet, jr., Wm. Paton, agent.
J. & H. Auchincloss	330 56	165 28	165 28	J. & H. Auchincloss.
Gardner Brewer for Amos King, Mairs & Co.	1,909 97	954 98	954 99	G. Brewer for A. M. Co.
Gardner Brewer for Salisbury Mills.	256 25	128 12	128 13	G. Brewer for S. M.
J. W. Paige & Co., in liquidation	778 31	389 15	389 16	J. W. Paige & Co. in liq.
J. W. Paige & Co., in liquidation	599 23	299 61	299 62	Merrimack Manufacturing Company, by F. B. Crawvenshield, treasurer.
J. W. Paige & Co., in liquidation	818 06	409 03	409 03	Hamilton Manufacturing Company, Arthur L. Devees, treasurer, by M. H. Heirchman.
Conrevie, Harding & Co	4,397 95	2,198 97	2,198 98	Conrevie, Harding & Co.
Morton, Grinnell & Co	357 11	178 55	178 56	Morton, Grinnell & Co.
Wm. A. Drown & Co	342 36	171 18	171 18	Wm. A. Drown & Co.
SECOND SECTION.				
A. T. Stewart & Co				
Benkard & Cutton				
Lord & Taylor				
Strang, Adnance & Co				

69 The following exhibits shows the judgment obtained by Presley, Lord & Inglesby for A. T. Stewart Co. versus Kerrison & Leiding:

Exhibit.

Sixth circuit of the United States of America, South Carolina district.

The President of the United States of America to the marshal of the said district, greeting:

You are hereby commanded, without delay, to attach the bodies of Edwin L. Kerrison and Herman Leiding, citizens of the State of South Carolina, and copartners in trade under the name and firm of Kerrison & Leiding, wheresoever they may be found within the aforesaid district,

so that you compel them to be and appear before the clerk of the circuit court of the United States of America for the aforesaid circuit and district, at the rules to be holden at Charleston, in the aforesaid district, on the first Monday in September next, to answer to Alexander T. Stewart, Francis Warden, and George Fox, citizens of the State of New York, and copartners in trade, under the name and firm of Alexander T. Stewart & Co., in a plea of tresspass on the case, and so forth.

And also, for certain promises and assumptions by the said defendants to the said plaintiffs, made and not performed, to damage of
70 the said plaintiffs fifteen thousand six hundred and twenty-one 76-100 dollars.

And have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States of America, at Greenville, South Carolina, district aforesaid, the first Monday of August, in the year of our Lord one thousand eight hundred and sixty-six, and in the ninety-first year of the sovereignty and Independence of the United States of America.

(Signed) B. C. PRESSLEY,
Plaintiffs' Attorney.

[SEAL.] DANL. HORLBECK,
C. C. C. U. S. for S. C.

We accept service, 8 August, 1866.

(Signed) McCRADY & SON,
Defendants' Attorneys.

Declaration.

UNITED STATES OF AMERICA,
South Carolina District, Fifth Circuit:

In the circuit court.

Edwin L. Kerrison and Herman Leiding, citizen' of the State of South Carolina, and late copartners in trade under the name and firm
71 of Kerrison & Leiding, were attached to answer to Alexander T. Stewart, Francis Warden, and George Fox, citizens of the State of New York, and copartners in trade under the name and firm of Alex. T. Stewart & Co., in a plea of trespass on the case, and so forth; whereupon the said plaintiffs, by Pressley, Lord & Inglesby, their attorneys, complain: For that whereas the said Alex. T. Stewart & Co. heretofore, to wit, at a supreme court of judicature of the State of New York, holden at the city of New York, and within the jurisdiction of said court, to wit, at Charleston, heretofore, to wit, on the sixth day of May, anno Domini eighteen hundred and sixty-one, before the honorable the justices of the same court, by the consideration and judgment of the same court, recovered against Edwin L. Kerrison and Herman Leiding, as well a certain sum of money, to wit, twenty-two hundred and eight $\frac{14}{100}$ dollars, the amount claimed, with interest, as also the sum of thirteen $\frac{31}{100}$ dollars for their costs and disbursements, amounting in the whole to the sum of twenty-two hundred and twenty-one $\frac{45}{100}$ dollars, to the said Alexander T. Stewart & Co., by the said court,
72 then of their own assent adjudged, whereof the said Edwin L. Kerrison and Herman Leiding were convicted, which said judgment still remains in that behalf in full power and effect, not in anywise satisfied, reversed, or annulled, to wit, at Charleston aforesaid, in the district aforesaid; and the said plaintiffs in fact say that no execution

hath as yet been obtained of or upon the said judgment, by means of which said several premises the said defendants became liable to pay the plaintiffs the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested; and being so liable, and the said last-mentioned sum of money being and remaining wholly due and unpaid, they, the said defendants, afterwards, to wit, on the day and in the year aforesaid, at New York, to wit, at Charleston aforesaid, undertook and faithfully promised to pay them, the said plaintiffs, the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards required.

2d. And whereas also the said Alex. T. Stewart & Co., heretofore, to wit, at a supreme court of judicature of the State of New York, holden at the city of New York, and within the jurisdiction
73 of said court, to wit, at Charleston heretofore, to wit, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-two, before the honorable the justices of the same court, by the consideration and judgment of the same court, recovered against Edwin L. Kerrison and Herman Leiding, as well a certain sum of money, to wit, the sum of five thousand four hundred and eighty-seven $\frac{77}{100}$ dollars, the amount claimed with interest, as also the sum of one hundred and one $\frac{66}{100}$ dollars for their costs and disbursements, amounting in the whole to five thousand five hundred and eighty-nine $\frac{43}{100}$ dollars, to the said Alex. T. Stewart & Co., by the said court then of their own assent adjudged, whereof the said Edwin L. Kerrison and Herman Leiding were convicted, which said judgment still remains in that behalf in full force and effect, not in any wise satisfied, reversed, or annulled, to wit, at Charleston aforesaid, in the district aforesaid; and the said plaintiffs in fact say that no execution hath as yet been obtained of or upon the said judgment, by means of which said
74 several promises the said defendants became liable to pay the plaintiffs the said last-mentioned sum of money when they, the said defendants, should be thereunto afterwards requested; and being so liable, and the said last-mentioned sum of money being and remaining wholly due and unpaid, they, the said defendants, afterwards, to wit, on the day and year aforesaid, at New York, to wit, at Charleston aforesaid, undertook and then and there faithfully promised to pay them, the said plaintiffs, the said last-mentioned sum of money, when they, the said defendants, should be thereunto afterwards requested.

3d. And whereas also the said defendants, on the twenty-sixth day of May, in the year of our Lord eighteen hundred and sixty, made their promissory note in writing, and then delivered the same to the plaintiffs, and thereby promised to pay to the plaintiffs or to their order at the Chemical Bank, New York, to wit, at Charleston aforesaid, seven months after date, the sum of twenty-one hundred and fifty-five $\frac{43}{100}$ dollars, which period had elapsed before the commencement of this suit.

75 4th. And whereas the said defendants, on the fourth day of September, in the of our Lord one thousand eight hundred and sixty, at New York, to wit, at Charleston aforesaid, were indebted to the said plaintiffs in the sum of five thousand four hundred and eighty-seven $\frac{77}{100}$ dollars for the price and value of goods on the day and year last aforesaid, sold and delivered to the said defendants by the said plaintiffs at the special instance and request of them, the said defendants, to wit, at New York, to wit, at Charleston aforesaid.

And in the further sum of seven thousand eight hundred and ten $\frac{88}{100}$ dollars, for money then lent by the plaintiffs to the defendants at their request.

And in the further sum of seven thousand eight hundred and ten $\frac{88}{100}$ dollars, for money then paid by the plaintiffs, for the use of the defendants at their request.

And in the further sum of seven thousand eight hundred and ten $\frac{88}{100}$ dollars, for money found to be due from the defendants to the plaintiffs on an account then and there stated between them.

And whereas the defendants, on the days and in the years
76 aforesaid, in consideration of the premises respectively, then promised the plaintiffs to pay them the several last-mentioned moneys respectively on request.

Yet they have disregarded their promises, and have not paid any of said money, or any part thereof, to the plaintiffs' damage fifteen thousand six hundred and twenty-one 76-100 dollars.

And therefore they bring suit, &c.

(Signed) PRESSLEY & INGLESBY,
Plaintiffs' Attorneys.

Copy of note on bill.

$2,155 43-100. CHARLESTON, S. C., *May* 26, 1860.

Seven months after date, we promise to pay to the order of A. T. Stewart & Co., at Chemical Bank, New York, twenty-one hundred and fifty-five 43-100 dollars, value received.

Due Dec. 26–29.

(Signed) KERRISON & LEIDING.

KERRISON & LEIDING } *ads.*
A. T. STEWART & CO. }

And the said defendants, by McCrady & Son, his attorneys, come and defend the wrong and injury, when, etc., and saith that he did not
77 undertake or promise in manner or form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, etc.

(Signed) McCRADY & SON,
Defendants' Attorneys.

L. 509. NEW YORK, , 186 .

Messrs. Kerrison & Leiding, Charleston, S. C., to A. T. Stewart & Co., Dr.

1860.				
July	25.	To mdze	$	51 75
Aug.	16.	" "	"	35 00
"	17.	" "	"	4,104 50
"	20.	" "	"	172 24
"	21.	" "	"	500 37
"	23.	" "	"	83 00
"	27.	" "	"	118 11
Sept.	3.	" "	"	1,286 14
"	3.	" "	"	599 26
"	5.	" "	"	10 80
"	7.	" "	"	4,474 69
"	11.	" "	"	581 05
"	13.	" "	"	92 44

"	13.	"	"	"	550 38
"	14th.	"	"	"	888 15
"	15.	"	"	"	29 74
"	25.	"	"	"	290 35
Oct.	9.	"	"	"	698 00
"	15.	"	"	"	63 00
"	15.	"	"	"	25 00
Nov.	7.	"	"	"	352 00
					$15,005 97

78 Sept. By mdze $16 26
Oct. " 31 50
1861.
April 12. " 105 67
May 2. " ..... 8,982 48 — $9,135 91

1861.
Due 4th March, 1861 ..... 5,870 06
Dec. 29. To note due this day, $2,155.43 ..... 2,155 43
Av'ge, due 14th February, 1861 ..... $8,025 49

Interest to 1st August, 1865, at 7 per cent., 4 years and 677, at 7 per cent 2,507 59

Due 1st August, 1865 ..... 10,533 08

Amt. judgment, open account $5,487 77

($8,982.48) goods returned—
Ten per cent. damages claimed $898 25
Court costs and disbursements 101 91
$999 91

NEW YORK, ,18 .

Messrs. Kerrison & Leiding, Charleston, S. C., to A. T. Stewart & Co., Dr.

1861.
May 6. To judgment in supreme court N. Y., R $2,221 45
1862.
Dec. 31. To do. in do. do. 5,589 43
$7,810 88

A. T. STEWART & Co.
vs.
KERRISON & LEIDING.

The note sued on this case is admitted.
The open account is admitted to this extent, and no more, viz, $5,487.77.
79 Also, the copartnerships of both plaintiffs and defendants are admitted.
(Signed) McCRADY & SON.

Verdict by jury.

We find for the plaintiffs nine thousand three hundred and eighty-nine 77-100 dollars.

(Signed) ALEX'R THOMPSON, *Foreman.*

AUGUST 21, 1868.

Therefore, it is commanded that the marshal of the said district do summon forty-eight good and lawful men, to be drawn by ballot, according to the directions of the act of Congress in such case made and provided, to be and appear before the justices of the said court, to be holden at Greenville, on the first Monday of August next, by whom, and so forth; and who neither, and so forth; to recognize, and so forth; because as well, and so forth; and the same day given to the parties aforesaid at the place aforesaid. And afterward, that is to say, on the day and at the place aforesaid, before the justices aforesaid, came as well the said A. T. Stewart & Co., by Pressley, Lord
80 & Inglesby, their attorneys aforesaid, as the said Kerrison & Leiding, by McCrady & Son, their attorneys aforesaid, and the jurors aforesaid being demanded, some of them, to wit, Alexander Thompson, foreman, and eleven others, came and being drawn by ballot, according to the directions of the said act of Congress aforesaid, and sworn of the jury aforesaid to say the truth of the within contained, do on their oath say that the said defendant did promise and assume as the said plaintiffs have alleged, and they find for the said plaintiffs the sum of nine thousand three hundred and eighty-nine 77-100 dollars.

Therefore, it is considered that the said plaintiffs do recover against the said defendants the sum of nine thousand three hundred and eighty-nine 77-100 dollars, as well as the sum of forty-six 75-100 dollars, costs and charges aforesaid, to the said plaintiffs, by the said court now here with their assent adjudged, which said damages and costs amount, in the whole, to nine thousand four hundred and thirty-six 52-100
81 dollars mentioned as; and be the said defendants in mercy, and so forth.

(Signed) PRESSLEY, LORD & INGLESBY,
Petitioners' Attorneys.

CHARLES KERRISON, ASSIGNEE OF KERRISON & Leiding, bankrupts,
vs.
A. T. STEWART AND OTHERS.

Statement of facts agreed upon by plaintiffs' attorneys, McCrady & Son, and defendants' attorneys, Pressley, Lord & Inglesby.

Statement of facts.

That by the act passed in February, 1823, entitled "An act to divide the State of South Carolina into two judicial districts," the State was divided into two districts in the manner following, that is to say, the districts of Lancaster, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield should compose one district, to be called the western district, and the residue of the State should form the other district, to be called the eastern district; and the terms of the eastern district should be held in Charleston; and that for the trial of all such criminal and civil causes

82 as were by law cognizable in the district court of the United States which might thereafter arise or be prosecuted or sued within the said western district, there should be one annual session at Laurens Court-House; that by another act of Congress approved 16th August, 1856, the place of session of the district court for the western district was changed, and the district court for the western district was directed to be holden at Greenville Court-House on the first Monday of August in each year. The third section of the act enacted that the said district court for Greenville, in addition to the ordinary powers of a district court of the United States, shall have jurisdiction of all causes except appeals and writs of error, which now are or may be hereafter made cognizable in a circuit court of the United States, and shall proceed in the same manner as a circuit court.

And in and by another section of the same act it was provided that the jurors for the said court should be drawn from the inhabitants of Greenville district, and the jurors to be drawn for the first term
83 of the said court should be drawn at the term of the district court to be holden at city of Charleston, provided they should be drawn at least ninety days previous to the time appointed for holding the said court at Greenville.

The first session of this district court for the western district sat at Greenville in August, 1857, and at that term all the records of issues ready for trial in the circuit court, as well as those in the district court, were taken thither, and the dockets of both courts called peremptorily; and in the same manner the court was held and the dockets were called there, (Greenville,) without objection from the bar, in 1858, 1859, and 1860, when the United States courts were closed by the war.

Writs were tested at Greenville after the Greenville term, (as at Charleston or Columbia,) generally returnable as other writs were, to rules-days, in Charleston, where only rules-days are held.

The same person was clerk of the two district courts and had his residence at Charleston, where the records of all courts were kept.

This practice was resumed after the re-opening of the United
84 States courts and was continued without open question from 1867, when the first session of the court was held at Greenville, until 1872.

Mr. Reverdy Johnson's exception to the juries at Columbia term of that year made the discussion public.

In the case of Stewart & Co. vs. Kerrison & Leiding, a writ entitled sixth circuit of the United States of America, South Carolina district, tested at Greenville, in the name of the Chief-Justice of the United States, was sued out by A. T. Stewart & Co. on or about the first Monday of August, 1866, against the said Kerrison & Leiding, in an action of assumpsit, returnable before the clerk of the circuit court of the United States of America for the aforesaid circuit and district, at the rules to be holden at Charleston on the first Monday in September next thereafter, upon which last-mentioned day Kerrison & Leiding appeared by their attorneys before the clerk and entered their appearance; and that afterwards, to wit, on the 4th December, 1867, the plaintiffs filed their declaration with the clerk of the court. The declaration
85 contained many counts, the two first of which were upon judgments which had been rendered in the New York courts, upon suits in which only one of the partners of Kerrison & Leiding had been served with process.

The defendants demurred to the two first counts in the declaration, specially because they were in assumpsit and not in debt; and the

plaintiffs joined in the demurrer. To the other counts the defendants pleaded specially that the causes of action counted on were merged in the judgment counted on in the two first counts; and the plaintiffs demurred to these pleas, and the defendants joined in the demurrer.

The cause being regularly at issue upon issues both of law and fact, was put upon the docket of the circuit court, (which was the docket on which the cases in the United States district court for the western district of South Carolina were always docketed.)

That the defendant's demurrer to the first two counts was argued at a regular term of the circuit court before his honor the presiding judge, Judge Bryan, on the 20th of June, at Charleston, and the demurrer overruled.

86 The demurrer of the plaintiffs to the defendants' special pleas was argued before the same judge on the third of July, in the same term, when the plaintiffs' demurrer was sustained and the special pleas overruled; and that the cause then stood upon the docket for trial on the general issue, which was not tried at that time, and the cause was continued generally.

That in the following August the said docket of the said court was taken up to Greenville, at which place, on the first Monday of that month, a regular term of the district court for the western district of South Carolina (said court having circuit court jurisdiction and powers) was held.

Before the beginning of the term the plaintiffs notified the defendants' counsel that they would insist upon a trial of the case at the approaching August term of the court, and the case was there tried on the regular call of the docket. It was argued by counsel for both plaintiffs and defendants, the defendants' counsel making no objection to the jurisdiction. The jury rendered a verdict for the plaintiffs.

We agree to the above statement of facts.

McCRADY & SON.
PRESLEY, LORD & INGLESBY.

87 And at the November term of the said court, 1874, the said parties came into court, by their solicitors aforesaid, and upon motion of Presley, Lord & Inglesby, defendants' solicitors, the following opinion was rendered by the honorable Hugh L. Bond, one of the judges of the said circuit court, which is in the words following:

Opinion.

CHARLES KERRISON, ASSIGNEE, PLAINTIFF,
against
A. T. STEWART & CO. ET AL., DEFENDANTS. } In equity.

It is admitted in the statement of facts filed in this cause that in the year A. T. Stewart & Co. recovered a judgment in the district court for the western district of South Carolina, which court by law is clothed with circuit court powers within that district, against Kerrison & Leiding, now in bankruptcy.

Kerrison & Leiding, before the rendition of said judgment, had made a deed of assignment for the benefit of certain creditors, which
88 deed Stewart & Co. successfully assailed in the courts of the State as fraudulent, and the judgment in that case, in which the trustees were parties defendant, bound the cestui que trust; also, Kerrison & Leiding then applied for the benefit of the bankrupt act, and were adju-

dicated bankrupts subsequently to the date of the judgment recovered in the district court of the United States.

Stewart & Co. claim to have a lien by virtue of their judgment upon the lands of the said bankrupts which came into the hands of the assignee. This claim is contested because it is alleged the record of the said judgment is irregular and imperfect, first, because the writ was tested in the name of the Chief-Justice of the United States, though the suit was in a district court, and was returnable before the clerk of the circuit court of the United States at Charleston, which is not within said district, who was likewise the clerk of said district court, instead of being returned to rules in the district court.

There are other irregularities set forth in the statement of facts
89 which it is not necessary to notice, because, notwithstanding them, all the defendants in the action appeared, pleaded, and went to trial before a jury of the district court of the western district without plea to the jurisdiction, and without any complaint or notice of the irregularities in question or of any of them.

Under these circumstances it must be considered that all errors in pleading and all irregularities in the titlings of the pleas or declaration and of return to the process were waived, and even if this were not so there is no remedy for the defendants except by appeal or writ of error to set the judgment aside or to reverse it. It cannot be inquired into in this collateral way.

I am of opinion that the judgment of A. T. Stewart & Co. vs. Kerrison & Leiding is a valid and subsisting one, and that they are entitled to be paid out of the proceeds of such of the real estate of the bankrupts as it was a lien upon according to its priority.

While the court refuses to set aside this judgment on account
90 of the irregularities complained of, it cannot refrain from saying for the benefit of the profession that in its judgment a plea to the jurisdiction of the district court at Greenville would have been well taken. That court is not a circuit court.

Neither the Chief-Justice of the United States nor the circuit judge, who are required by law to hold circuit courts, can hold or assist in holding the district court for the western district of South Carolina. That court, held by the district judge, has circuit court powers within the territory prescribed by law for its jurisdiction which any person legally entitled may invoke at pleasure, but there is no authority at all for removing causes originally brought in the circuit court of the United States to that court against the consent of parties, except in certain criminal cases at the instance of the district attorney.

I am aware that the practice to do so has prevailed for some time, but it has produced great confusion, and has no warrent in law.

HUGH L. BOND,
Ct. Judge.

15 Dec., 1874.

91 And at the November term of the said court, 1874, the honorable George S. Bryan, district judge, rendered the following opinion, which is in the words following:

Opinion.

I concur in the conclusion reached by the circuit judge, differing only with him as to his view of the court held in Greenville; but in spite of that difference, and independently of it, coincide in his judgment.

I hold to the construction of the jurisdiction of the district court of Greenville placed upon it at the time of its institution, and prevailing without dissent, if I am properly advised, up to the time of these proceedings.

This court has been held to be a portion of the circuit court system of the State, and, interchangeably with the court held in Charleston and Columbia, carried forward the business of all suitors in the United States courts of the State.

It is objected to this district court with circuit court powers
92 that it cannot possess the authority and legal potency of a circuit court, and cannot be regarded as a circuit court, because it is not necessary nor possible for the circuit judge proper (of recent institution) nor an associate judge of supreme court (originally the only circuit judge) to be present at the sitting of this court. And it must be conceded that this objection would have great if not conclusive force if the presence of either of these judges were necessary to the constitution of a circuit court, or to the legal holding of such court. By law it is otherwise. By the recent act creating the circuit judge proper, as distinguished from the associate judge of the Supreme Court, who is also a circuit judge, the district judge is clothed with all the authority of a circuit judge, so far as the original business and jurisdiction of the circuit court is concerned. In the absence of either of these judges, from whatever cause, he is empowered to hold the court, and alone wields the whole authority of the court, in the same manner and to the same extent as could be exercised by either sitting alone, or together
93 with each other, or with the district judge. He cannot of course hear an appeal from himself as district judge sitting as circuit judge. This he cannot do in Greenville any more than in Charleston. But the appeals have been and are made as regularly from his decisions in the one as in the other; and in both they are made to one of the two judges alone authorized by law to hear such appeals. The decisions of the district judge, as a district judge, coming within the scope of his authority, criminal or civil, as a district judge, are subject, in the way of appeal, to one or other of the judges having appellate jurisdic' over the district courts of the State.

The appellate jurisdiction, as to the entire business in bankruptcy transacted in Greenville, as in Charleston, is subject to the same authority embracing the one jurisdiction of the State, and represented by the judge who has common appellate jurisdiction of all district business proper throughout the State.

When the district judge in Greenville, as in Charleston or Columbia, administers the authority and acts upon subjects limited to the
94 circuit court, and which can only be administered by a circuit judge proper, or the district judge sitting as a circuit judge, the appeals are from him in this court, as they would be from him sitting as circuit judge in Columbia or Charleston, directly to the Supreme Court. His authority by law is in either case the same. He exercises precisely the same authority, and his decisions are to be dealt with in the same way. By law he is made a circuit judge, as I have stated, (with the limitation I have mentioned,) in Charleston, Columbia, and Greenville. He exercises the whole authority of the circuit court, by law, alike in Charleston, Greenville, and Columbia. And this authority rests upon positive legislation, and finds its source and vindication, in either case, in convenience. Congress has judged it convenient and expedient that the district judge should exercise the authority permanently and alone in Greenville that he exercises (with the limitations

set forth in the statutes) when sitting alone and holding the circuit court in Charleston or Columbia.

95 It was as competent for Congress to clothe him with this authority in the one case as the other. And it was deemed expedient and, it may be, even necessary, that the associate judge of the Supreme Court, who was the only circuit judge when the Greenville court was instituted, should be excused from attendance on it. A similar necessity has called into existence the intermediary class of circuit judges who are not associate judges of the Supreme Court, and have no final appellate jurisdiction.

It is worthy of note that the class of courts to which the Greenville court belongs, as Conklin in his valuable treatise observes, (4th ed., p. 266,) possess the authority to satisfy the exigency of the 12th sec. of the judiciary act, which confers upon the citizen the right as a defendant to have the suit removed to the "next circuit court to be held where the suit is pending." A very recent decision of the Supreme Court (18 Wallace, ex. parte State Insurance Company) no longer leaves this a question.

96 In dealing with the problem, whether the so-called western district can be considered a judicial district in the legal and highest sense of the term, profitable reference can again be made to the learned, careful, and able text-writer just quoted. He says, after treating of such districts—beyond question such—"But of several other States, subdivisions have been made of so anomalous a character, and so different from each other, as to render it no easy matter to decide whether any of them, and, if any, which, are entitled to the appellation of judicial districts. North Carolina, Tennessee, South Carolina, Alabama, Mississippi, Georgia, Arkansas, and Iowa are the States referred to."

The primal judicial districts, constituted immediately after the adoption of the Constitution, were all completely organized; they all had the proper officers necessary to the character and functions of a court—judge, clerk, marshal—their jurisdiction was independent, absolute, exclusive.

97 Based upon the States, and in a large measure upon the destinctive and several laws and law of each State, they were necessarily limited to the territory of each State. And even when, from the immence and sudden increase of population and business, certain States had of necessity to be divided, and independent jurisdictions created, they still of legal necessity (as we have seen based on State laws) had to be administered as U. S. courts, as for the different States in which they were held. They could not escape from this distinction, so intimately connected and blended were the State and Federal jurisdictions they represented.

The profession and the court are greatly indebted to the defendants' counsel (Mr. Edward McCrady, jr.) for his exhaustive, critical, and elaborately technical essay upon the history and character of the peculiar courts we have to do with in this case.

With this acknowledgement, gratefully made, the district judge is compelled to say that, after the most careful perusal and consideration of it and the legislation to which it refers, he can see nothing in that legislation—nothing that has been done and all that has been omitted

98 to be done—which could furnish stable ground for the conclusion at which he arrives, that South Carolina is divided into two independent judicial districts, and that the western district (so called) is a district by itself. This conclusion is an inference drawn from legislation defective, uncertain, and contradictory, if regarded as a whole,

and to be used as furnishing a rule and standard by which to test the character and jurisdiction of this court.

It would seem something more certain, inevitable, and positive were required to set aside the practice which has obtained since the institution of this court and the other circuit courts of the State, and the great weight of authority which sustains that practice, it having received the sanction of Mr. Justice Wayne for more than a quarter of a century on the bench, as also the late Chief-Justice of the United States, and also the learned and distinguished judge who for so many years administered the Federal justice of South Carolina.

And when we consult expediency and look to the work that
99 this court and the other circuit courts have to do, it will appear that only as a whole and parts of a common system can they best effect the end for which they were created. It cannot be wisely forgotten that the Federal circuit courts were instituted to furnish to the citizens of the United States in every State the same justice in each State that the citizens enjoy among themselves, and equal facility for obtaining that justice. They have to compete with the circuit courts of the States and provide for their suitors, not only the same remedies, but these remedies as promptly furnished, as by the State courts. The U. S. courts must do this or cease to be effective and fail of their objects.

To apply this: if the circuit courts are limited to Columbia and Charleston, suitors in these courts have but two terms in the year in which they can obtain justice. And if the circuit court held in Greenville is shut up to Greenville, the suitors in this court have but one opportunity in the year, and a continuance works a year's certain postponement of the cause. When it is remembered that the circuit
100 courts of the State, of common jurisdiction, have three terms a year at which judgment can be had, it will be obvious at what disadvantage suitors, even in Charleston or Columbia, pursue their remedies in the Federal courts; and those in Greenville have such scant opportunity and so tardy as almost to amount to a denial of justice.

And if, besides this, the jurisdiction was exclusive and suitors compelled to go there, this court might well be considered an asylum to all defendants and a delusion and a snare to all plaintiffs.

In connexion with the idea of equal dispatch in the Federal courts in competition with the State courts, as entering materially into an equal remedy in the U. S. courts, as contemplated in their institution, it is a pregnant fact that wherever, by the law governing the State courts, an imparlance is allowed in the State courts, an imparlance is also by Federal enactment (1st Brightly, p. 794, sec. 10) allowed in the U. S. courts, and vice versa—thus insuring perfect equality in the progress of causes in either class of courts, and securing in the vital ele-
101 ment of time like opportunity to suitors in both judicial forums.

Holding this fact in view, what can be thought of a U. S. court which, not standing alone, as in a Territory, but established in an ancient State, with a complete system of courts fully organized and of common jurisdiction, with regular triennial sessions, what can be thought of such a court, and of what avail could it be to suitors, looking to the fact that I have stated, when such court held but one session in a year?

Judge Bond, in the decree in this case, stated, as his opinion—

"That court, (namely, the court held in Greenville, exercising its circuit court jurisdiction,) held by the district judge, has circuit court powers within the territory prescribed by law for its jurisdiction, which any person legally entitled may invoke at pleasure, but there is no authority

at all for removing causes originally brought in the circuit court of the United States to that court against the consent of parties, except in certain criminal cases, at the instance of the district attorney."

102 Judge Bond does not state whether, in his judgment, the suitor who can sue in Greenville can also sue in Charleston or Columbia; in words, whether the circuit courts held in Charleston and Columbia are limited to the territorial limits of the eastern district, or whether they possess common jurisdiction with the Greenville court of the counties composing the western district and can issue their process against the inhabitants of these counties whilst in these counties.

Has the circuit court jurisdiction only of the eastern district, or does its jurisdiction embrace the entire State?

If the courts held in Charleston and Columbia have common jurisdiction, and a case brought in Charleston against a citizen of one of the counties in the western district can be transferred to Columbia, and, upon a continuance, or incompleted, can be further prosecuted there, then will the suitor in these courts have the chances and benefits of two terms in the year for the prosecution of his case over any other suitor who may sue in the Greenville court, and thus that court be put

103 to the additional disadvantage of contending against the U. S. circuit court with its two terms a year, as well as against the State courts with their three terms a year?

Where is the equality of remedy, either as to the State courts or the United States circuit courts?

But if the court held in Greenville possess exclusive jurisdiction, and suitors of the other States are compelled to sue the inhabitants of the counties composing the western district in that court, (with its one term a year,) and, when they go there, must stop there, and cannot transfer their cases to Columbia, but must be hindered for a whole year in the farther prosecution of their cases, what becomes of their equal remedy, either as against the suitors in the eastern district or suitors in the State court?

Is legislation with such unjust consequences, and so opposed to the whole theory of the U. S. courts as the organs and instruments of equal justice to the stranger as against the citizens of any State between themselves, to be accepted as the legislation of the country?

104 Is it to be supposed that Congress could have done anything so unequal and abortive?

On the whole, looking to what Congress has done in reference to this court, taken in connection especially with what it has not done, the provision it has made and the provision it has failed to make, the conclusion seems to be irresistable that it can only be effective as an organ of Federal justice, when accepted (as it has hitherto been) as one of the three courts constituting a system instituted by the country to secure equal justice to the citizens of the United States. So held, it is a necessary, or at least a most helpful, complement to the circuit courts previously established by furnishing a third term in the year, and thus putting the U. S. courts on an equality with the State circuit courts.

Thus regarded as an integral portion of the circuit-court system of the State, all confusion disappears and the Federal judicial administration, whilst reduced to unity, gains both in completeness

105 and efficiency.

And does not this view receive emphatic confirmation from the fact that the mere doubt of the soundness of this construction of the character of this court, and the place it holds in the judicial system of the State, (of so recent birth,) has put the whole system afloat

and introduced chaos and perplexity where there had hitherto been neither question, hesitation, or disorder?

Whilst, therefore, concurring with the circuit judge as to the validity of the judgment in question, upon the narrow technical ground of the special and exceptional pleadings in this case (saving the jurisdiction of the court) upon which he rests his judgment, I have not felt at liberty to withhold my dissent from the novel view which he has felt called upon, in the discharge of his duty, to publish for the benefit of the profession as to the regular normal jurisdiction of the court in which this judgment was had.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

106 And at the November term of the said court, 1874, the said parties came into court, by their solicitors aforesaid, and upon motion of Pressly, Lord & Inglesby, defendants' solicitors, the following decree was rendered by the honorable Hugh L. Bond, one of the judges of the said circuit court, which is in the words following:

Decree.

In the circuit court. In equity.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

CHARLES KERRISON, ASSIGNEE, PLAINTIFF,
against
A. T. STEWART & CO. ET AL., DEFENDANT'.

It is ordered, adjudged, and decreed that Charles Kerrison, assignee in bankruptcy, do sell, at public auction, on the first Monday in February next, or on some other sales-day, to be agreed upon by counsel, all the real estate of the bankrupts in the State of South Carolina,
107 on the following terms: One-third cash, and the balance on a credit of one and two years, to be secured by the bonds of the purchasers, carrying interest from the day of sale at the rate of seven per cent. per annum, and mortgages of the premises sold; the buildings to be insured, and the policies of insurance assigned; and that out of the proceeds of sales to be made under this order, or of sales made under previous orders, he pay first the costs of these proceedings, to be taxed by the clerk, and then to A. T. Stewart & Co. the principal, interest, and costs due upon the judgment recovered by them in the United States court against Kerrison & Leiding.

It is further ordered that it be referred to J. E. Hagood, special master, to enquire and report what disposition should be made of the balance of said proceeds of sale, who are the parties entitled thereto, and their respective privities.

HUGH L. BOND,
Ct. Judge.

15 Dec., 1874.

And on the 15th day of December, A. D. 1874, came Charles Kerrison, assignee of Kerrison & Leiding, by their solicitors,
108 McCrady & Son, and then and there prayed that an appeal be granted from the said decree, rendered as aforesaid, which prayer was granted.

The petition and order are in words and of the tenor following:

Claim and allowance of appeal.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

And now William Paton, John S. Ludlum, William McKenzie, Thomas C. M. Paton, and Jonathan Longmire, late copartners carrying on business in the city and State of New York under the firm of Paton & Co.; Benjamin H. Hutton, who hath survived James Benkhard, late copartners under the firm of Benkhard & Hutton; M. D. Benjamin, one of the copartners of the firm of M. D. Benjamin & Co.; F. Junet, William H. Lee, Justice A. Bliss, Orlando Douman, Gordon McTaggart, and George A. Pitman, copartners lately carrying on business in the city and State of New York under the firm of W. H. Lee & Co.; Lewis Switzer and John A. Switzer, copartners lately carrying on business under the firm of Lewis Switzer & Co.; Thomas Cochran and William Barlow, copartners lately carrying on business under the firm of Cochran &
109 Co.; John Goard, Henry Goard, and Henri Lacowbee, copartners lately carrying on business under the firm of Gourd, Freres & Co.; William R. Babcock and George Pomeroy, copartners lately carrying on business under the firm of Babcock & Pomeroy; John Slade and Francis M. Slade, copartners lately carrying on business under the firm of John Slade & Co.; Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noy, and Henry M. Gridley, copartners lately carrying on business under the firm of Gardiner, Brewer & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, copartners carrying on business under the firm of Lord & Taylor; William H. Hortsman, Sigismund H. Hortsman, and Henry M. Allien, copartners lately carrying on business as Hortsman Bro.; and Allien-Peleg Hall, Seth G. Babcock, Charles H. P. Babcock, Charles E. Milnor, and Jonathan O. Bartholomin, copartners lately carrying on business under the firm of Babcock & Milner; Eliakem S. Bowles, David Stewart, W. C. Hicks, and Edgar L. Hicks, survivors of the firm of Paton, Stewart & Co.; The Amoskeag Manufacturing Company, The Salisbury Mills Company, James Hazelhurst, and Benjamin H. Smith, late copartners carrying on business under the firm of Hazelhurst & Smith; S. D. Babcock, trustee of the firm of Stone & Co.; Amos King, Arthur W. Jaffray,
110 Edward S. Jaffray and Richmond W. Jaffray, copartners, lately carrying on business under the firm of J. R. Jaffray & Sons; J. and H. Auchincloss, H. E. Jenkins, surviving copartner of the firm of Jenkins and Huntingdon; Frederick Philips, copartner of the firm of Frederick Philips & Co.; Henry Walton, William Brummer, copartners of the firm of William Brummer & Co.; J. W. Paige, copartner of the firm of J. W. Paige & Co.; L. P. Morton, copartner of the firm of Morton, Grinnell & Co.; W. R. Pearson and W. A. Drown, copartners under the firm of William A. Drown & Co.; and J. B. Adriance, copartner of the firm of Strang, Adriance & Co., the defendants, who were impleaded together with Alexander T. Stewart, Francis Warden, and George Fox, late copartners under the name of A. T. Stewart & Co., in the bill of interpleader of Charles Kerrison, assignee of Edwin L. Kerrison and Herman Leiding, late copartners under the firm of Kerrison & Leiding, bankrupts, after a final decree in the said cause, come and show to the court that the matter in dispute exceeds the sum of two thousand dollars, and thereupon claim and appeal from the said final decree to the Supreme Court of the United States to be holden at Washington
111 on the second Monday in October next, and the same is accordingly allowed, and the appellants are ordered to searve the usual citation according to law.

Witness the honorable George S. Bryan, one of the judges of the circuit court of the United States for the district of South Carolina, the fifteenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

We accept service.
15th December, A. D. 1874.

PRESSLEY, LORD & INGLESBY,
Attys. for A. T. Stewart & Co.
PORTER & CONNER,
Attys. Charles Kerrison, Assignee.

Citation.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

To Alexander T. Stewart, Francis Warden, and George Fox, late copartners under the name of A. T. Stewart & Co.:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a claim and allow-
112 ance of appeal filed in the circuit court of the United States for the district of South Carolina, wherein Charles Kerrison, assignee of Edwin L. Kerrison and Herman Leiding, late copartners under the firm of Kerrison & Leiding, bankrupts, is complainants, in a bill of interpleader, and William Paton, John L. Ludlum, William McKenzie, Thomas C. M. Paton, and Jonathan Longmire, late copartner', carrying on business in the city and State of New York, under the firm of Paton & Co.; Benjamin H. Hutton, who hath survived James Benkhard, late copartners under the firm of Benkhard and Hutton; M. D. Benjamin, one of the copartners of the firm of M. D. Benjamin & Co.; F. Junet, William H. Lee, Justice A. Bliss, Orlando Dowman, Gordon McTaggart, and George A. Pitman, copartners, lately carrying on business in the city and State of New York, under the firm of W. H. Lee & Co.; Leuiz Switzer and John N. Switzer, copartners, lately carrying on business under the firm of Leuiz Switzer & Co.; Thomas Cochran and William Barbour, copartners, lately carrying on business under the firm of Cochran & Co.; John Gourd, Henri Gourd, and Henri Lacombe, copartners, lately carrying on business under the firm of Gourd, Frere & Co.; William R. Babcock and George Pomeroy, copartners, lately carrying
113 on business under the firm of Babcock & Pomeroy; John Slade and Francis M. Slade, copartners, lately carrying on business under the firm of John Slade & Co.; Gardner Brewer, John L. Brewer, William M. Brewer, James S. Noy, and Henry M. Gridley, copartners, lately carrying on business under the firm of Gardner Brewer & Co.; John S. Lyle, John T. Lord, and George W. T. Lord, copartners, carrying on business under the firm of Lord & Taylor; William H. Horstman, Sigismund H. Horstman, and Henry W. Allien, copartners, lately carrying on business as Horstman, Bro. & Allien; Peleg Hall, Seth G. Babcock, Charles H. P. Babcock, Charles E. Milner, and Jonathan O. Bartholouin, copartners, lately carrying on business under the firm of Babcock & Milner; Eliakem S. Bowles, David Stewart, W. C. Hicks, and Edgar L. Hicks, survivors of the firm of Paton, Stewart & Co.; the Amoskeag Manufacturing Company, the Salisbury Mills Company, James

Hazelhurst and Benjamin H. Smith, late copartners, carrying on business under the firm of Hazelhurst and Smith; S. D. Babcock, trustee of the firm of Stone & Co.; Amos King, Arthur W. Jaffray, Edward S. Jaffray, and Richmond W. Jaffray, copartners, lately carrying on business under the firm of J. R. Jaffray & Sons; J. and H. Auchin-
114 closs, H. E. Jenkins, surviving copartner of the firm of Jenkins & Huntington; Frederick Philips, copartner of the firm of Frederick Philips & Co.; Henry Walton, William Bummer, copartner of the firm of William Bummer & Co.; J. W. Paige, copartner of the firm of J. W. Paige & Co.; L. P. Morton, copartner of the firm of Morton, Grinnell & Co.; W. H. Pearson and W. A. Drown, copartners under the firm of William A. Drown & Co.; and J. B. Adriance, copartner of the firm of Strang, Adriance & Co., are defendants to the said bill of interpleader, and appellants, and you are defendants to the same, and appellees, to show cause, if any there be, why the said decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable George S. Bryan, one of the judges of the circuit court of the United States for district of South Carolina, the 15th day of December, in the year of our Lord eighteen hundred and seventy-four.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

We accept service.
15th December, 1874.

PRESSLEY, LORD & INGLESBY,
Attys. for A. T. Stewart & Co.
PORTER & CONNER,
Attys. of Charles Kerrison, Assignee.

115 In the circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

I, J. E. Hagood, clerk of the said circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true copy of the records and proceedings of the decree in the case of Charles Kerrison, assignee of Kerrison & Leiding, complainants, against A. T. Stewart & Co. et al., defendants, rendered as aforesaid, together with all things relating thereto.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, in the district aforesaid, this the 25th day of February, 1875.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

(Indorsement on cover:) No. 297. Charles Kerrison, assignee of Edwin L. Kerrison, Herman Leiding, et al., appellants, vs. A. T. Stewart, Francis Warden, and Geo. Fox, late copartners as A. T. Stewart & Co. So. Carolina C. C. U. S. Filed 23 April, 1875.

IN THE SUPREME COURT UNITED STATES.

OCTOBER TERM, 1876.

CHARLES KERRISON,

ASSIGNEE OF KERRISON & LEIDING.

vs.

A. T. STEWART & CO., PATTON & CO., AND OTHERS.

IN BANKRUPTCY.

STATEMENT OF CASE

AND

ARGUMENT OF EDWARD McCRADY, JUNR.,

ON BEHALF OF APPELLANTS.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS,
NOS. 3 BROAD AND 109 EAST BAY STREETS.
1876.

IN THE SUPREME COURT UNITED STATES.

OCTOBER TERM, 1876.

CHARLES KERRISON, ASSIGNEE OF KERRISON & LEIDING, IN BANKRUPTCY,

vs.

A. T. STEWART & CO., PATON & CO., AND OTHERS.

Statement of Case on behalf of Paton & Co., and others, Appellants.

This is an appeal from a decree of the Circuit Court, for the Eastern District of South Carolina, in a cause in which a bill of interpleader was filed by Charles Kerrison, assignee of Kerrison & Leiding, bankrupts, against sundry persons claiming adverse interest touching property of the bankrupts vested in the assignee, (§ 2 Bankrupt Act), to wit: (1) A. T. Stewart & Co., who claim priority of lien under an alleged judgment; and (2) William Paton, and others, who claim priority under a certain deed of trust to the said Charles Kerrison, by way of mortgage executed by the bankrupts for the benefit of their creditors five years prior to their bankruptcy.

Pleadings—Bill.

The bill alleges the bankruptcy of Kerrison & Leiding, 6th April, 1872, the choice and confirmation of Charles Kerrison, as assignee, and the assignment of the property of the bankrupts to him. That the valuable part of the property consisted (1) of the sum of $, in the hands of the assignee, upon which there was no lien; (2) another sum of

$, the rents and profits of the real estate, included in the conveyance in trust to Charles Kerrison, just mentioned, and held by him as such trustee; and (3) the real estate claimed by the different creditors to be bound by their liens as follows:

1. That the first of these claims is made by Paton, and other creditors, under conveyance in fee made by Kerrison & Leiding, both as partners and as individuals, on 1st May, 1867, *habendum*. To have and to hold the premises in trust, first, as a *security* for the several respective parties creditors of the said Kerrison & Leiding, named in the *first* section of the *schedule*, annexed to the deed for the amounts set opposite their names with interest, and also for all such other parties, creditors of the said Kerrison & Leiding, whose names are, as is believed and intended, correctly stated in the *second* section of said schedule, who, at any time before the 1st December then next following, in lieu of his claims should take and accept the notes of said Kerrison & Leiding, bearing same date, 1st December, 1866, payable at the same time (two and three years) after date, with interest from 1st June, 1865, each note for one half of the principal due such creditors, so as to be on same footing as creditors in *first section*. and the proper amounts to be set opposite to their names. In the next place in trust, if notes be not paid, to sell so much as may be necessary, or to raise enough by mortgage, if he thought best, to pay off the notes as they became due, together with all proper charges and commissions, not to exceed five per cent. upon such sums raised, with power to sell the whole earlier, at discretion of Charles Kerrison, trustee, who should then pay the notes; or if not sufficient to pay all, then to pay *pro rata*.

The bill then states the record of the deed in the proper office, and another conveyance of Herman Leiding, of a tract near Asheville, North Carolina, with like *habendum* and its proper registry. That under these deeds the creditors who have executed the deeds, claim that the real estate was thus pledged and bound to them, and that they are entitled to have the same sold for their benefit, and the proceeds paid to them *pro rata*, if not sufficient to pay them in full.

2. The second claim is that of A. T. Stewart & Co., who claim under an alleged judgment upon proceedings commenced in the (U. S.) Circuit Court at Charleston, and afterwards brought to trial at Greenville, where a verdict was obtained against Kerrison & Leiding, 21st August, 1868, for $9,436.52, and *nulla bona* return made at Charleston upon execution thereon, whereupon Stewart & Co. filed their bill in State Court against Kerrison & Leiding, Charles Kerrison, and Paton & Co., and Hutton, the two last as representatives of the creditors, who had executed the deed, praying that the deed might be cancelled. That the bankrupts and Charles Kerrison were duly served with subpœnas and answered the bill; that publication was made for Paton & Co. and Hutton, who did not appear or answer, whereupon decree *pro confesso* was taken against them; that in the suit in the State Court, Stewart & Co. obtained a decree declaring the deed invalid and void against them, and the property of the bankrupt subject to their execution, which decree, upon appeal to the Supreme Court of the State, was affirmed.

Answers.

The answers of the defendants set out more fully their respective claims to priority.

1. That of A. T. Stewart & Co. disputes the validity of the deed under which Paton and others claim, because, as they say, (1.) That Kerrison & Leiding, the bankrupts, had no right to require them to release a portion of their just demands, and to receive the balance by instalments, under the penalty of being debarred from all participation in the property conveyed to Charles Kerrison, especially while Kerrison & Leiding retained for their own use and under their own control not only the rents and profits of the assigned real estate, but a large and valuable portion of their personal assets." (2.) That they had obtained a judgment "in the United States Courts for the District of South Carolina," on a trial held at Greenville, 21st August, 1868, upon which judgment was entered up on the 28th September, for the sum of $9,436.52, and execution sued out and returned *nulla bona*.

(3.) That thereupon they had filed a Bill in the Court of Common Pleas, for the County of Charleston, in the State of South Carolina, against the said bankrupts—Charles Kerrison, the trustee, Paton & Co., and Hutton, Survivor of Benkard & Hutton, the two last as representatives of the creditors who had accepted the deed, praying that the deed might be cancelled. That service had been made upon the bankrupts, and Charles Kerrison, the trustee, who had answered, and publication for the other defendants, who failed to answer, whereupon decree *pro confesso* had been taken against them; that upon these proceedings a decree had been pronounced by the said Court, declaring the deed void, which decree, upon appeal, had been affirmed by the Supreme Court of the State, and that thereupon all the creditors of the bankrupts are bound by these proceedings in the State Court. (4.) That execution had thereupon issued upon the judgment, and all the real estate contained in the deed, situated in the City of Charleston, levied upon and advertised for sale, which sale had been stayed by the proceedings in bankruptcy.

II. The joint and several answer of Paton & Co., and Hutton, and others, who had not been named in the Bill in the State Court—(1.) Deny that they were parties to any proceedings in the State Court, unless the defendants, Paton & Co., and Benjamin H. Hutton, who only were named in the bill, should be so considered, and insist that they are not bound, or estopped, by the said decree. (2.) That the conveyances in trust to Charles Kerrison were, according to modern usage, apt and proper conveyances, by way of mortgage, to secure the debts due by Kerrison & Leiding to the defendants, and others, and were *bona fide* mortgages and securities for that purpose, to which the defendants, having become parties in good faith, by their acceptance and execution of the deed, now have good right to resort for payment of their respective claims against the late firm of Kerrison & Leiding; and that, notwithstanding the decrees of the Courts of the State of South Carolina, the defendants not being parties in the cause in which the said decrees were rendered. (3.) That what is mentioned and described as the judgment of A. T. Stewart & Co. against Kerrison & Leiding, in the

complainants' Bill of Complaint, is no judgment at all, but a mere nullity, as would appear upon an inspection. The answer then proceeds to give the history of the proceedings upon which the said judgment rests. (4.) The defendants, Paton & Co., and B. H. Hutton, answering for themselves, say that they are not bound by the decree in the cause of A. T. Stewart & Co. against Charles Kerrison, and Kerrison & Leiding, although they might have been named defendants in the Bill of Complaint, because they were absent from the State of South Carolina, and that no attempt was made to make the parties to the said cause in any other manner than by publication in the newspapers of the said State, under a special Act of the General Assembly of the said State, and by the terms of which Act they are allowed two years, from and after the decree of the Supreme Court of the said State, to come in and shew cause against the said decree, before the expiration of which period of two years Kerrison & Leiding were adjudged bankrupts, and the defendants called into the Court, in which they now crave leave to shew the cause they might otherwise have done in the State Court; that they were neither citizens nor residents of the said State at any time before or since the decree. (5.) That the decrees in that cause were given upon the material allegations that Stewart & Co. had obtained a judgment, and sued out an execution of *fieri facias*, which had been returned *nulla bona*, when, in fact, there was no such judgment.

TESTIMONY.

The case was submitted upon bill and answers and a statement of facts agreed upon by counsel, which are briefly, that by an Act of 1823, the State of South Carolina was divided into two judicial districts, to wit, the Eastern District and the Western District. The terms of the Eastern District to be held in Charleston, and the term of the Western District, "for such criminal and civil causes as were by law cognizable in the District Court of the United States which might thereafter arise, or be prosecuted or sued within the said Western District, to be held at Laurens. That by another Act of 1856, the place for holding the session of the District Court for the Western Dis-

trict was changed to Greenville, and the jurisdiction of the Court extended to all cases cognizable in a Circuit Court of the United States, the said Court to proceed in the same manner as a Circuit Court. That by another section of the same Act, the jurors for this Western Court should be drawn from the inhabitants of Greenville District (now County), those for the first term to be drawn at a term of the District Court, holden at Charleston. That from the first session of the Court held in Greenville (1857 to 1872), of course with the intermission of the war; in practice it was regarded that there was but one Circuit Court in the State sitting in succession in Charleston, Greenville, and Columbia, and that the same person was Clerk of the two Districts, having his residence in Charleston.

The statement then sets out the pleadings upon which the alleged judgment rests, that the writ was issued at Greenville, in the Western District, returnable to Charleston, in the Eastern, to which writ Kerrison & Leiding appeared by their attorneys in Charleston, where the plaintiffs filed their declaration. That the declaration contained many counts, to some of which the defendants demurred, and to other of which they pleaded, and to which plea the plaintiffs demurred. That these demurrers to declaration and pleas were argued and heard at Charleston. That when, upon notice by the plaintiffs that they would insist upon a trial of the cause at Greenville, the defendants' counsel attended and without objection to the jurisdiction, argued the case, and that upon that trial the verdict upon which the judgment is based was rendered.

DECREE.

The Circuit and District judges who heard this cause have filed contrary opinions, but unite in a decree for the sale of all the real estate of the bankrupts, directing that after payment of the costs, that the proceeds be first applied to the payment of A. T. Stewart & Co., the principal, interest, and costs due upon the judgment recovered by them in the United States Court against Kerrison & Leiding," and order a reference to a master to enquire and report what disposition should be

made of the balance, and who are the parties entitled thereto, and their respective priorities.

OPINIONS.

The Circuit Judge, assuming that it was admitted in the statement of facts agreed upon that the judgment was recovered in the District Court for the Western District of South Carolina, holds that that Court is a distinct and separate Court from that over which he presides, and that, in his judgment, a plea to its jurisdiction would have been well taken by Kerrison & Leiding, as inhabitants of the Eastern District, but that as they appeared, pleaded and went to trial before a jury of the District Court for the Western District without plea or objection to the jurisdiction that the style and title of the proceedings, test and return of the writ indicating that the proceedings were in the Circuit Court at Charleston, were irregularities which were cured, and holds the judgment good. That if this were not so, that there is no remedy for the defendants except by appeal or writ of error, to set aside the judgment, or to reverse it.

He also holds that the decree in the State Court in which the deed for the benefit of the creditors of Kerrison & Leiding had been successfully assailed, and to which the trustee was the party defendant, bound the *cestui que trust*, whether or not made parties.

The District Judge, while concurring in the conclusion reached by the Circuit Judge, dissents from the views expressed in his opinion in regard to the Court at Greenville, and holds that that Court is an integral part of the Circuit throughout the State, and is the same as the Court which sits in Charleston and Columbia, and that therefore the writ tested at Greenville was properly returnable to Charleston, and the trial before the jury at Greenville was regular, though the declaration, pleas and demurrer had been filed, argued, and decided, in Charleston.

ASSIGNMENT OF ERRORS.

1. That the Circuit Court erred in holding that the decree of the State Court, declaring the deed invalid, and to which decree Charles Kerrison, the trustee, was a party, bound the *cestuis que trust*, the appellants, who were not parties thereto.

2. That the Circuit Court erred in holding that the appellants, who were not parties to the proceedings in the State Court, could not inquire into the validity of the judgment under which Stewart & Co. claimed a prior lien as against them.

3. That the Circuit Court erred in holding that the judgment of A. T. Stewart & Co. *vs.* Kerrison & Leiding, is a valid and subsisting lien, and entitled to priority in payment, as against that defendant.

4. That the Circuit Court erred in not declaring the deed by Kerrison & Leiding to Charles Kerrison, in trust for their creditors, valid, and a prior and subsisting lien upon the property, for the benefit of the creditors who accepted its terms.

IN THE SUPREME COURT UNITED STATES.

OCTOBER TERM, 1876.

CHARLES KERRISON, ASSIGNEE OF KERRISON & LEIDING, IN BANKRUPTCY,

vs.

A. T. STEWART & CO., PATON & CO., AND OTHERS.

Argument of Edward McCrady, Jr.

This is an appeal from a decree of the Circuit Court exercising its jurisdiction under the Bankrupt Act to adjust liens and priorities upon the estates of bankrupts. The contention is between a single creditor on the one hand, who, by virtue of an alleged judgment, claims payment in full out of an insolvent estate to the exclusion of all others; and on the other, the other creditors of the bankrupts, who not only deny the validity of the alleged judgment, but who insist that they have priority by virtue of a deed in trust by way of mortgage in their favor.

The case arises in this way: The firm of Kerrison & Leiding, the bankrupts in this case, on the 1st May, 1867, desiring to resume the business they had carried on before the war, then being indebted to a large number of creditors upon claims arising prior to the late war, but possessed of an estate deemed ample for the full payment of all, if time were allowed them to realize the same, and if no claim was made for interest during the war, (their liability for which interest was then an open question, and since denied by this Court), after consultation and negotiation with their creditors, executed a deed in fee of all their real estate to Charles Kerrison, in trust, to secure those of their creditors (all of whom were named in a schedule thereto) who should by

signing the schedule accept its terms, by which terms the desired time for payment was given and no claim made for the doubtful interest.

A. T. Stewart & Co., the appellees, who were among their creditors, refused to enter into any arrangement with Kerrison & Leiding, instituted suit, and claim to have obtained a judgment in the United States Courts, in South Carolina, against Kerrison & Leiding, upon which alleged judgment they procured a return of *nulla bona*, and thereupon filed a bill in the State Court to have the deed declared invalid, and the property covered by it subject to their execution. Kerrison & Leiding, and Charles Kerrison, the trustee under the deed, were made parties to this bill, but none of the other creditors were named therein, except Paton & Co., and Benjamin H. Hutton. These, it is true, were named as representatives of the other creditors, but not having been found within the jurisdiction of the Court, and not voluntarily appearing thereto, were made parties only by publication, and an order, *pro confesso*, was taken against them. Upon this bill, on the 22d June, 1870, Stewart & Co. obtained a decree declaring the deed invalid as to them, which decree, upon appeal to the Supreme Court of the State, was affirmed on the 18th March, 1872, and on the 9th April, following, Stewart & Co. levied upon the property contained in the deed. But before the levy, to wit, on the sixth of April, 1872, Kerrison & Leiding were adjudged bankrupts, and Charles Kerrison, the same person who was trustee under the deed, was duly elected assignee of the estate, and the property of the bankrupts vested in him.

Stewart & Co. then, upon the call of the creditors by the Bankrupt Court to prove their demands, set up their alleged judgment as a lien upon the property, and Paton and others, creditors, who had accepted the deed, set up that deed as lien upon the same, and thereupon Charles Kerrison, the assignee, filed his bill in the Circuit Court, under the third clause of the second section of the Bankrupt Act, to have the conflicting claims of the defendant adjusted, so that he might proceed with the settlement of the estate in his hands.

This appeal is taken from the decree of that Court, upon

the bill of the assignee, and the answers of Stewart & Co. on the one hand, and of the other creditors on the other, and presents the following questions :

1. Are the creditors of Kerrison & Leiding, who accepted the deed, all, or any of them, bound by the decree in the State Court, by reason of the publication, and order *pro confesso* against Paton & Co., and Hutton ?

2. If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, can they in this proceeding question the judgment which Stewart & Co. claim ?

3. If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, and can in this proceeding question it, is the judgment of A. T. Stewart & Co. against Kerrison & Leiding valid ?

4. If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, is that deed valid ?

The first two questions, it will be observed, are preliminary and raise objections, by means of which Stewart & Co. seek to avoid an examination of the alleged judgment upon which they rest their claim to priority. The other two involve the merits of the case.

1. Are the creditors of Kerrison & Leiding, who accepted the deed, all or any of them, bound by the decree in the State Court, by reason of the publication, and order pro confesso against Paton & Co., and Hutton ?

1. To answer this first question, we must consider (*a*) whether, as in the opinion of the Circuit Judge, the creditors who accepted the deed were so represented in the suit in the State Court by the trustee, as to preclude their now insisting upon their rights under it, (*b*) whether they could be so rep-

resented as to be bound by a decree *pro confesso* against certain of their number selected by the complainant for that purpose, and (*c*) whether Paton & Co., and Hutton, who were so selected by Stewart & Co. in the suit in the State Court, were so made parties to that suit as to preclude their rights and those of the other creditors under the deed ?

(*a.*) The general rule undoubtedly is, that all the *cestuis que trust* must be before the Court, in order to bind them. But this rule is subject to qualification, as in some cases where the *cestuis que trust* are too numerous. "How large the number must be in order to dispense with calling all before the Court, has never been determined. Where there were twenty-one *cestuis que trust*, the Court required them all to be joined, but in one case where the *cestuis que trust* were twenty-six in number, and in another twenty-seven, and bills were filed nearly twenty years after the institution of the trusts, a few were allowed to maintain bills in behalf of the whole for the execution of the trusts." (*Perry on Trusts*, § *885*.) But it will be observed that, in the first case cited in the authority just quoted (*Smart vs. Bradstock*, *7 Beavan*, *500*), the Master of the Rolls says the parties were twenty-seven in number *twenty years ago ; there is no telling what number they may amount to at the present time ;* and in the other (*Bateman vs. Margerison*, *6 Hare*, *496*), the Vice-Chancellor, though following the authority of *Smart vs. Bradstock*, observed that length of time, so far as the partnerships were concerned, would tend to reduce the number of parties, for as the members of the several firms were diminished by deaths, the survivors only would be interested. In *Bainbridge vs. Burton*, *2 Beavan*, *539*, it was held that a bill could not be maintained by twelve out of thirty-eight proprietors of a newspaper, against one, who was also book-keeper, but that the other twenty-five were necessary ; and in *Holland vs. Baker*, *3 Hare*, *68*, fifty-four scheduled creditors to a trust deed were held necessary parties.

Another qualification of the rule is found in the instance of bondholders under railway mortgages, in which suits are maintained though the bondholders, the *cestuis que trust* are

not parties, in addition to the objection of their numbers, because of the absolute impossibility at any time of ascertaining who they are, as the bonds are sold in the market and pass from hand to hand by mere delivery. (See *Mr. Justice Curtis' opinion in Hall vs. Sullivan Railway, cited in Note to 2 Redfield Railways*, § 235.)

This Court has had occasion, in several recent instances, to point out the distinction between indispensable parties, necessary parties, and formal parties. (*Shields vs. Barrow, 17 How. 130; Canal Co. vs. Gordon, 6 Wallace, 561; Payne vs. Hook, 7 Wallace, 431; Traders' Bank vs. Campbell, 14 Wallace, 94: Carson vs. Robertson, 19 Wallace, 94.*) In the last case, *Carson vs. Robertson*, while holding the mortgagee, who had not been made a party, necessary to the determination of the litigation, the Court held that the complainants had the option to make him a party, or to proceed without him, and take the hazard of his filing a new and independent bill, and renewing the litigation.

This may have been the position of the parties to the proceedings in the State Court under consideration. If the trustee, Charles Kerrison, had pleaded, or demurred, to the bill, for the want of the creditors who had accepted the deed, as parties, the State Court might, perhaps, properly have overruled the plea, or demurrer, and held that Stewart & Co. had the option to make them parties, or to proceed without them, at the hazard of a renewal of the litigation by them.

The counsel of Stewart & Co. were evidently afraid of this when they filed their bill, for they took what measures they thought sufficient to bind the creditors by representation and substituted service by publication. The efficacy of their measures we shall discuss presently, but will only observe here that thus having admitted the necessity of having the creditors represented, they now discredit the sufficiency of their proceedings to that end, in an effort to show that they were not necessary parties.

In the argument below the counsel for A. T. Stewart & Co. cited and relied upon certain authorities, which they regarded as conclusive of the question as to the necessity of making the creditors in this case parties. Let us examine them.

1st. The first, and as quoted, apparently conclusive authority, is that of Story. They say:

"In Story, on Equity Pleading, §150, that distinguished jurist uses this language: 'It has been laid down by Lord Redesdale, as a general rule, that when any persons are made trustees for the payment of debts and legacies, they may maintain a suit either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they are trustees, which, in many cases, would be impossible. *And the rights of the creditors or legatees will be bound by the decision of the Court,*'" etc.

The last sentence, italicised by the counsel who quote it, would be strong authority for their position if it stood alone, and were it not that Story concludes the paragraph with the remark that it has, however, been recently suggested that the rule so laid down by Lord Redesdale, is too broad and comprehensive, and that in §217, referring again to the subject, the learned author says: "But this rule, as we have seen, seems to admit, if it does not absolutely require, some qualification." But not only so; in Section 149, Story, on the contrary, prescribes the rule we insist upon, viz., that the creditors whose names were given in the schedules to the deed, and who executed it, were necessary parties to the suit. In this section, viz., §149, he says:

"In many other cases, persons having specific charges on trust property, are also necessary parties. Thus, for example, if an indenture of assignment should be made by a debtor, conveying all his property to such of his creditors as should execute the indenture within three months, and twenty only of his creditors should, within the period, execute the indenture, and a suit should be brought by a judgment creditor to recover satisfaction out of the trust property upon the ground of the priority of the judgment, *all the creditors who had signed the instrument, their names being known, ought to be made parties, and an allegation in the bill, of their being numerous, would not be sufficient.*"

With the difference as to the number, *thirty-five* creditors in our case having signed the instrument, instead of *twenty*, as in that put by the learned author; the case put by him is

exactly the case now under consideration, and in regard to it he says, " *all the creditors who had signed the instrument*, their names being known, ought to have been made parties, and that an allegation in the bill, of their being numerous, would not be sufficient." The deed in this case being on record, the names of the creditors who signed were known to Stewart & Co.

The counsel of Stewart & Co. then allude to *Harrison vs. Stewardson, 2 Hare, 533*, in which twenty-one *cestuis que trust* were required to be joined, and say that case was shaken, if not overruled, in *Smart vs. Bradstock*. But it will be recollected that the master of the rolls there says that the parties were twenty-seven in number *twenty years ago, and there is no telling what number they amount to at the present time*. In this case there were thirty-five on the 1st December, 1867, and the bill in the State Court, to which we insist they should have been made parties, in order to bind them, was filed on the 1st January, 1870, but little more than two years after. In *Bateman vs. Margerison*, in which they say *Smart vs. Bradstock* was followed, the vice-chancellor, as we have seen, did so reluctantly, observing that length of time would tend to reduce the numbers instead of increasing them where they were partners.

The next case quoted by counsel was that of *Shaw vs. R. R. Co., 5 Gray 162*, but that case was one of railroad bonds coming under the exception we have stated, as explained by Mr. Justice Curtis, in *Hall vs. Sullivan Railway*.

The ruling of Chancellor Walworth in two cases, (*Rogers vs. Rogers, 3, Page 379*, and *Wakeman vs. Grover, 4, Page 33*,) is cited and relied upon with confidence by the appellees. The Chancellor, in these cases, undoubtedly lays down, with great positiveness, the rule that where the complainant claims in opposition to the assignment of a deed of trust, and seeks to set the same aside on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee who is the holder of the legal estate in the property, without joining the *cestui que trust*. For authority for this rule the learned Chancellor cites several cases in which it had been so done in New York, but in none

of which was the point even made. He also quotes Lord Redesdale as laying it down as a principle that persons having demands prior to the creation, of the trust and not claiming under the same, may enforce their claims against the trustees without bringing the persons interested in the trust before the Court. But, upon reference to the page to which the learned Chancellor refers, we find that Lord Redesdale adds, in explanation:

"Persons having specific charges on the trust property in many cases are also necessary parties; but this will not extend to a general trust for creditors or *others, whose demands are not distinctly specified in the creation of the trust.*"

Upon Lord Redesdale's authority, therefore, the appellants having specific charges in the trust property, and their demands having been distinctly specified in the creation of the trust, they were necessary parties to the suit in the State Court, and consequently not bound by the decree obtained without them.

In the case of *Harrison vs. Stewardson, 2 Hare, 530,* alluded to by counsel for Stewart & Co., in which, though it does not appear that attention was paid to the qualification of the rule put by Lord Redesdale, himself, Vice Chancellor Wigram said: "It is impossible to say that the practice of the Court is in conformity with the passage which has been cited from Lord Redesdale's treatise; for the almost universal rule is to make the legatees parties whose legacies are charged on real estate. . . . . In cases like the present, the general rule is that all the persons interested shall be parties to the suit."

We have thus far considered the question by the light only of the authorities relied upon by the appellees, but there are others which with equal force prescribe the rule that schedule creditors are necessary parties to a suit.

The case of *Newton vs. The Earl of Egmont, 5 Sim., 130,* a case argued by Sugden on the one side, and Spence on the other, was in many of its features similar to the one under consideration. It was the case of a conveyance to trustees in trust for such of the creditors of the grantor as should execute the conveyance, and whose names were set down in

a schedule thereto annexed, and who, upon executing the release, were to receive "assignable indentures or certificate of acknowledgment" for the amount of their several and respective debts. The bill alleged that the release was executed by *thirty* creditors of Lord Egmont, as parties of the second part, and amongst them by two who were named defendants to the suit, that the plaintiff was ignorant of their residences, and whether they were living or dead, save as to the two named. To this bill a plea was put in giving the names and residences of twenty-six. Upon the hearing the Vice-Chancellor, Sir Launcelot Shadwell, remarks:

"It was said by the plaintiff's counsel that the debentures were assignable, and the plea ought to have averred that they remained in the hands of the persons to whom they were originally given, but I do not think that any such averment was necessary, because it must be presumed that they remained in the hands of the persons to whom they were originally given until the contrary is shown. Besides the plea alleges that the parties are, or claim to be, interested in the subject matter of the suit, and that allegation is a sufficient answer to the second objection. * * * *

"The last and most important objection is that which regards the number of the persons, who it is stated, ought to be made parties to the suit. I accede to the rule laid down in Adair *vs.* the New River Company. That rule, however, applies only to the cases where there is one genal right in all the parties, that is, where the character of all parties, so far as the right is concerned, is homogeneous, as suits to establish a modus or a right of suit to a mill. Notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with. Thus if the bill is filed to have the benefit of a charge on an estate, all persons must be made parties who claim an interest in the charge. In this case, where the question is priority of charge. the very nature of the question makes it necessary that all the creditors should be parties; it implies a contest with every other person claiming an interest in the land. The circumstance of the persons named in the plea being judgment creditors, does not remove the difficulty, for there may have been releases, assignments, want of docketting, and other circumstances affecting each claim.

I am, therefore, of opinion, that all the persons named in the plea are necessary parties to the suit, and consequently the plea must be allowed.

So too, in the case of *Holland vs. Baker, 3 Hare, 68*, in which property was assigned to three trustees for certain *scheduled creditors*—fifty-four in number—it was held, notwithstanding their numbers, that the creditors named in the schedule were necessary parties, and were not sufficiently represented by the two surviving trustees alone.

See also *Kimber vs. Ensworth, 1 Hare, 293. Weatherby vs. Giorgio, 2 Hare, 624.*

These cases establish the rule that where property has been conveyed in trust for creditors whose names are given or "scheduled," that they should all be made parties. The first, while settling this point, answers also the objection that as the notes of Kerrison & Leiding were assignable, that they may have passed into other hands, and that, therefore, Stewart & Co., in filing their bill in the State Court, could not know who were the holders, so as to make them parties. The notes are presumed to have "remained in the hands of the persons to whom they were originally given until the contrary is shown, besides the plea in our case (bill) alleges that the parties are or claim to be interested in the subject matter of the suit, and that allegation is a sufficient answer to the objection."

b. But if this had been one of those cases in which the Courts have allowed a numerous class to be represented, "substantially represented," as it has been termed, by one or more, it is at least questionable, how far the absent parties would be bound by such representation. In *Powell vs. Wright, 7 Beavan, 446*, Lord Langdale, the Master of the Rolls, says:

"Where some of a class are made parties, it is a very inaccurate mode of expression to say that they represent the rest. The others may be perfectly ignorant of the proceedings and of what is going on. It is a matter of convenience or necessity when the Court allows one to sue on behalf of the rest. In consequence of the difficulty arising from the number of parties interested, the Court relies on the assistance of one of the class, on the faith, that having the same interest with the absent parties interested, the facts, as affecting them, will be fairly brought before the Court. But in such a case as this, how could you prevent another of the same class from filing his own bill, if he will not submit to be represented by the person party to the record? Besides which, the defendants named to represent the class would in this case be selected by the plaintiff himself; if those only whom the plaintiff pleases be made parties, it would be strange to say that the others who are absent would be bound."

And again, at p. 450:

"I have never heard that the proceedings in the suit are to all intents binding on the absent parties. So far as I know, it has never been declared that the absent persons are to be cut off from all chance of correcting any error which, in consequence of their absence, may have been made to their prejudice. The Courts in these cases are always doing what may be prejudicial to the absent parties."

This last quotation from Lord Langdale is given with the full text of his remarks in the last edition (Redfield, 8th) of Story Equity Pleadings, p. 150.

In the language, therefore, of Lord Langdale, it is, at least, very inaccurate to say that Paton and Hutton would have represented the other creditors had they been made parties by process and had answered. The other creditors may have been perfectly ignorant of the proceedings; indeed, there is no allegation that they were aware of them. In such a case as this, can you prevent the other creditors, not to say from filing their own bill, but from setting up their claims under the deed in the bankrupt Court into which they have been called to protect their interest? Are the absent persons in this case to be cut from all chance of correcting the errors into which Kerrison & Leiding, and Charles Kerrison fell, the error of admitting Stewart's judgment to be valid? Besides which the defendants named to represent the class *were* in this case selected by the plaintiff himself. If those only whom Stewart & Co. please be made parties, it would be strange to say that the other creditors who were absent would be bound.

c. But it will be recollected that not even a representative creditor was made a party by process personally served, and that none appeared or answered. It appears by the bill and answers that Paton & Co. and Hutton, who were named as representatives of the creditors, are citizens of the State of New York, and were only made parties by publication; that they did not appear, nor answer, and that the decree *pro confesso* was taken against them under a statute of the State of South Carolina. It remains, therefore, before we conclude this branch of our argument, to examine that statute, and to consider what was done under it, and its effect.

Constructive service of process by publication, substituted in the place of personal service, against persons beyond the territorial jurisdiction of the Court, is never favored. *Arlingworth vs. Barbour, 4 Pet., 466; Boswells, Lessee, vs. Otis, 9 How. 336; Webster vs. Reid, 11 How., 437; Lincoln vs. Tower, 2 McLean, 437; Thompson vs. Emmert, 4 McLean, 96.* The

subject has been recently fully considered by this Court in the case of *Galpin vs. Page, 18 Wallace, 350*, and the subject again reviewed by one of its members, Mr. Justice Field, in the same case, upon its remand to the Circuit.

Mr. Justice Field, in delivering the opinion of this Court, *Galpin vs. Page*, defining the doctrine of presumption in favor of judgments, says:

"The presumptions indulged in support of the judgments of superior Courts of general jurisdiction, are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. * * *

"Whenever, therefore, it appears from the inspection of the record of a Court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the Court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. * * * * * * * *

"When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the Court upon such service is authorized to proceed against the person of an absent party, not a citizen of a State, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions"

See, also, the opinions of Mr. Justice Field in this case, on its remand to the Circuit; *1 Am. Law Times, Rep. 523.* And in *Gray vs. Larrimore, 2 Abb. U. S., 542*, quoted in Freeman on Judgments, § 7; and see *Hollingsworth vs. Barbour, 4 Peters, 446.*

It is true that upon the argument below, it was not objected that the provisions of the statute of the State, in reference to publication, had not been complied with; but when Stewart & Co. object to our being heard in this Court because of a decree which they obtained in our absence, every principle of justice exacts that they shall show a strict and literal compliance with the statutory provisions under which they invoke the benefit or protection of the decree.

McLean, J., in *Boswells, Lessee, v. Otis, 9 How., 346*, says:

"No principle is more vital to the administration of justice than that no man shall be condemned in his person or property, without notice and an opportunity to make his defence; and every departure from the fundamental rule by a proceeding *in rem*, in which *a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny.*"

The provisions of the Statute of 1784, (*A. A., Vol. VII., p. 210*), under which publication was made as to Paton & Hutton, are as follows:

XII. And be it further enacted by the authority aforesaid, That if in any suit in the said Court; a defendant against whom a process shall issue, shall not cause an appearance to be entered thereupon, as it ought to have been, if such process had been duly served, and affidavit shall be made to the satisfaction of the Court that such defendant

READ. This Act was never altered or amended, except by an Act of 1866, "to shorten and regulate the publication of notices to absent defendants in Equity," which was superseded by the Code in 1870.

a. a. Vol. 13 = 425

This act was never altered or amended, and no other provision for making absent persons parties by publication existed until the adoption of the code of procedure in 1870, and so strictly was it construed that, where there was no defendant in the State, it was held that the suit must be brought and publication made in Charleston, although the property in question was situated in another part of the State. (*Taylor vs. Williamson, McMullan, Eq. 350.*) The practice under it was, however, to publish in other newspapers after the South Carolina Gazette ceased to appear. But it does not appear by the record in this case that upon affidavit made to the satisfaction of the Court, that the defendants, Paton & Co., and Hutton, were without the limits of the State, that a rule or order was made by the said Court directing and appointing

him to appear at a certain day, nor that within ten days thereafter a copy of that order was inserted in a newspaper at Charleston and continued to be published for three months, nor that another copy thereof was posted at a door of the State House, at Charleston, nor that proof was made to the satisfaction of the said Court of the publication thereof, as aforesaid, nor that before the decree in the case, which it is said is to bind not only Paton & Co., and Hutton, but all the other creditors, that Stewart & Co. gave security to abide such order as might be made in the defendants appearing to the suits and paying such costs as might be required.

"The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." *Galpin vs. Page, p.* 350.

It does not appear from the record that any of these things were done, and, as we have seen, this Court holds that there is no presumption that all or any of these requirements of the statute were complied with, and that since it does not so appear, there is no evidence that jurisdiction was acquired over Paton & Co., and Hutton, and the decree therein does not bind them, still less the other creditors.

But if jurisdiction had been acquired over Paton & Co., and Hutton, by the alleged publication, the decree of the State Court would still be open to inquiry and judgment, not only as to the rights of the other creditors, but as to the rights of Paton and Hutton themselves.

It was assumed in the pleadings and argument below, that the Act of 1784, under which publication had been made, limited the time for petition to review, and hence Stewart's counsel argued that two years having elapsed, from the 22d June, 1870, without petition or appeal by Paton & Co., or Hutton, that the decree became final and conclusive, as to them, on the 22d June, 1872. We insist that the appeal to the Supreme Court suspended the decree, and that Paton & Co., and Hutton, still had two years from the decision of the Supreme Court of the State confirming it, that is, from the 18th March, 1872, to the 18th March, 1874, within which to shew cause against it. But it is not necessary to discuss that point, for the provision of the new Code of Procedure allows

them seven years, within which, upon cause shewn, to come in and defend after judgment.

As will be recollected, the bill in the State Court was filed, 14th January, 1870, and the order for publication then made under the Act of 1874. The new Code of Procedure was adopted 1st March, 1870, and it was, by § 465, enacted that its provisions were to apply to future proceedings, as follows: "1. If there have been no pleading therein to the pleadings and all subsequent proceedings. 2. Where there is an issue of law, or fact, or any other question of fact, to be tried to the trial, *and all subsequent proceedings.*" (*A. A., Vol. 14, p. 527, § 465.* In *Ahrens vs. State Bank, 3 Rich. N. S., p. 410*, it is said, under Section 645, the provisions of the Code are applicable in future proceedings, in suits therefore pending, where issue has been joined, and governs the proceedings upon the trial, and all subsequent proceedings in such case. By the Code it is provided. § *158, Ibid 457.*

"The defendant, against whom publication is ordered, or his representative, on application and sufficient cause shewn at any time before judgment, must be allowed to defend the action, and, except in an action for divorce, the defendant, against whom publication is ordered, or his representative, may, in like manner, upon good cause shewn, be allowed to defend after judgment, or any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just," etc.

Under this provision, as there is no claim that the notice was given, Paton & Co., and Hutton had, therefore, seven years certainly from the 22d June, 1870, within which to shew cause in the State Court against the decree, which time has not yet expired. Surely, therefore, when the assignee, Charles Kerrison, filed his bill in the United States Circuit Court, calling in Paton & Co., Hutton, and the other creditors, to contest the judgment of Stewart & Co., they are at liberty to do so.

In *Trader's Bank vs. Campbell, 14 Wallace, p. 87*, this Court held that the provision that the assignee may prosecute and defend all suits pending at the time of the adjudication in bankruptcy, to which the bankrupt is a party, does not oblige him to seek a remedy in the State Courts. As the creditors of the bankrupts at the time of the bnkruptcy had, therefore, several years within which to show cause against

the decree, if indeed they were in any way affected by it, the assignee was not bound to await the exercise by others of this right in the State Court, but in order to close the estate properly brought all the parties into the Circuit Court to contest these their claims to priority. Having thus been brought in, the creditors of Kerrison & Leiding are now entitled to shew cause against the decree.

We think then we have clearly shown (*a*) that the creditors who accepted the deed were necessary parties to the proceedings in the State Court, and were not represented therein by the trustee, (*b*) that neither could they be so represented by those of their number who were named in the bill by Stewart & Co., as defendants, to wit: Paton & Co., and Hutton, and that (*c*) if they could have been so represented by parties properly made to the bill, that in this case it does not appear from the record that Paton & Co. and Hutton were so made parties, and that if they had been, that they are at liberty in this proceeding to avail themselves of the time allowed them by statute to shew cause against the decree.

Having thus disposed of the first formal objection to our hearing in this case, we proceed to the next, which has been interposed to prevent an examination of the record of the alleged judgment under which Stewart & Co. claim to absorb the estate of the bankrupt to the exclusion of other creditors.

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2. *If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, can they, in this proceeding, question the judgment which Stewart claims?*

The Circuit Judge held that the record set up by Stewart & Co., as a judgment, could not be inquired into, in a collateral way; that there was no remedy for the creditors to set it aside if irregular, except by appeal or writ of error. But as the appellants were not parties to the proceedings upon which that judgment was entered, to say that they can only attack it by appeal or writ of error, is to say, that they cannot question it at all, however much it may affect their rights and interests. This is an appeal from a decree in the Cir-

cuit Court which was invested with power by the Bankrupt Act to ascertain and liquidate liens and specific claims, and to adjust priorities and conflicting liens. But how can the Court determine the validity of the lien of a judgment which is set up as binding upon the bankrupt estate, if the creditors interested in that estate are not to be heard? The bankrupt against whom it is entered, has no interest and is not heard, except as a witness. Who but the creditors, other than they who set it up, should contest it? But they cannot appeal or sue out a writ of error from the judgment as they were neither parties nor privies to it. They can only examine it as strangers and question its validity, as it appears from the face of the record, and, if so be, attack it collaterally (*Galpin vs. Page*). But this they can do.

Thus it was said by Shaw, C. J., in *Vose vs. Martin, 4 Cushing, 31.*

"At the time the judgment was rendered, the tenant had no reason, no occasion, and no right to question its validity. Being neither a party nor privy to the judgment, he cannot have a writ of error to reverse it, although it may be erroneous and void; but when such judgment is set up collaterally to defeat the tenants' title, which is otherwise good, and the tenant can show that his judgment is erroneous, either in matter of law or fact, he may do so by proof. It is a general and established rule of law that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may without reversing, prove it so erroneous and void in any suit in which its validity is drawn in question. The cases are numerous and a few only will be cited, including the first and the last which have been decided in Massachusetts. *Alexander v. Gould*, 1 *Mass.*, 165. *Smith v. Saxton*, 6 *Pick*, 483. *Pond v. Makepeace*, 2 *Met.*, 114. *Leonard v. Bryant*, 11 *Met.*, 370.

The rule on this subject is thus laid down in *Freeman on Judgments*, § *334.*

* * * * * The parties to an action cannot impeach or set at naught the judgment on any collateral proceedings, on the ground that it was obtained through fraud or collusion. It was their business to see that it is not so obtained. * * * * * *It is only third persons who have the right to collaterally impeach judgments. They are accorded this right, because not being parties to the action, nothing determined by it is to them res adjudicata.* The rule is correctly stated in *Corvin, Hill and Edwards, note* 291, *to Phillips on Evidence*, as follows: "Judgments of any Court can be impeached by strangers to them for fraud or collusion, but no judgment can be impeached for fraud by a party privy to it."

In the language of Chief Justice Shaw, in *Vose v. Martin*, at the time the judgment was obtained by Stewart v. Kerrison & Leiding, the other creditors had no reason, no occasion, and no right to question its validity. Being neither parties nor privies to the judgment, they could not have a writ of error to reverse it, although erroneous and void; but when Stewart & Co. set up their judgment collaterally to defeat their rights under the deed, and they can show that the judgment is erroneous, they may do so. Their rights are collaterally affected by the judgment, and they can in this proceeding, in which its validity is drawn in question, show that it is void.

The rule is thus laid down by this Court in *Elliott, et al., vs. Peirsol, et al,, 1 Pet., 340.*

"Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers. This distinction runs through all the cases on the subject, and it proves, that the jurisdiction of any Court exercising authority over a subject may be enquired into in every Court, when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

And in *Lincoln vs. Tower, 2 McLean, 473:*

"Upon the whole we can entertain no doubt that when the judgment of a neighboring State is offered in evidence, the inquiry must be made whether the Court had jurisdiction over the parties and the subject matter. Not that any error in this collateral manner could be considered, but the rights of the defendant cannot be concluded unless he was properly before the tribunal. And of this the Court, which shall be called to give effect to the judgment, must judge.

See also Note (*b*,) page 261, 1 Kent's Com., (12 edit. Holmes'.)

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3. *If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, and can, in this proceeding, question it, is the judgment of A. T. Stewart & Co. against Kerrison & Leiding valid?*

Having thus disposed of the preliminary objections interposed by A. T. Stewart & Co. to prevent an investigation of

the paper they rely upon as a record of a judgment, we have at length reached the first question involving the merits of this controversy, viz: is the judgment set up by Stewart & Co. a valid one?

The history of the legislation in regard to the Courts of the United States, in the State of South Carolina, is traced in an Essay, entitled "*An Enquiry into the Subject of the Territorial Limits and Jurisdiction of the Circuit and District Courts of the United States in States divided into Districts*," copies of which are filed with this argument, and to which we ask leave to refer. It will be seen that the State of South Carolina, by Act of Congress of 1823 (*3 Stat., 726*), was divided into two Districts. The Counties (Districts) therein named to compose one District, "*to be called the Western District*," and the residue of the State to compose another, "*to be called the Eastern District.*" By this Act the District Court, for the Western District, was to be held at Laurens. No provision was made for the holding of a Circuit Court, nor were Circuit powers conferred upon the District Court for the Western District, as had been done in all previous cases in which new Districts had been created, and which Districts were not added to some already existing Circuit. No provision having been made for the drawing of juries, the United States Courts were never held under this Act; and, in 1856, another Act was passed to remedy the condition of things, which, changing the place of holding the Court to Greenville, provided for the drawing of juries from the District (now County) of Greenville. By this Act Circuit powers were conferred upon the District Court, which was to sit at Greenville. (*11 Stat., 43.*)

Upon the passage of this Act the Circuit Court, which was holden at Charleston in 1857, adjourned to Greenville, and a Court was held there, which was regarded as but a term of the Circuit Court, which then and since has been held at Charleston and Columbia. From that time until the question was made in this case, the three Courts at Charleston, Greenville, and Columbia, were regarded as but one, the dockets and records of which were in succession carried from one to the other. This was the common practice, the common error, but so clearly an error that the moment attention

was called to it the practice was at once abandoned by bench and bar. In accordance with this practice, the writ in this case was sued out in Greenville, and tested there in the name of the Chief Justice, returnable to rules at Charleston, declaration filed in Charleston, special pleas and demurrers filed and argued in Charleston, and issue joined in Charleston, and the case tried in its merits at Greenville, where the judgment was entered and execution issued, returnable to Charleston, where the record now is.

The Circuit and District Judges unite in sustaining this amphibious record, but they do so from contradictory reasons ; each points out the other's fallacy, but does not see his own.

The Circuit Judge recognizes, and is careful to declare, for the benefit of the profession, that the Court held at Greenville is a different one from that which sits at Charleston and Columbia ; that the Court held by the District Judge, at Greenville, has Circuit Court powers *within* the territory prescribed for its jurisdiction, which any person legally entitled may invoke at pleasure, but that there is no authority at all for removing causes originally brought in the Circuit Court to that Court against the consent of parties. But holding that the Courts are distinct, in order to sustain the judgment, he has to assign the record to the one Court or to the other, and to reconcile its contradictions to its existence in the Court of his choice. He finds that the judgment rests upon a record in the District Court for the Western District.

The District Judge does not believe that the record can either straddle the two Courts, or be made to fit the procrustean bed of either. He invokes the sanction of the past, and upholds the practice he found and did not establish. He maintains that there is but one Court, the Circuit Court of the United States for South Carolina, which sits in succession at Charleston, Greenville, and Columbia.

Let us see if the record can be sustained upon either theory. And, first, let us look into that of the District Judge, and afterwards into that of the Circuit Judge.

a. The opinion of the District Judge rests upon the mistaken theory that the United States Circuits have an organi-

zation and existence separate from and independent of the District Courts, and in some way connected with State territories; but an examination into the history of their organization will show that this is a mistake. The Circuits are not composed of such and such States, but of such and such Districts. For instance, "the Fourth Circuit includes the *Districts* of Maryland, Virginia, West Virginia, North Carolina, and South Carolina." (*Revised Statutes*, § *604.*) It is not composed of the States of Maryland, Virginia, West Virginia, North and South Carolina, but of the Judicial Districts of the United States for those States. These Districts, it is true, have usually been coterminous with the States, but not always so. By the very first organization, two States, Massachusetts and Virginia, were divided each into two Judicial Districts, (*Judiciary Act, 1789*), and afterwards the State of Arkansas and the Indian Territory for some time (from 1844 to 1851) constituted but one Judicial District. Judge Bond is not then the Circuit Judge for the *States* of Maryland, Virginia, West Virginia, North and South Carolina, but for the United States Districts in these States. The Circuit Court has no separate existence from the Judicial Districts, and its jurisdiction is limited in each instance to the territorial limits of the Districts, for which at the time it sits. *Toland vs. Sprague, 12 Peters, 300; Levy vs. Fitzpatrick, 15 Peters, 171; Chaffee vs. Howard, 20 How., 208; Ex-parte State Insurance Co., 18 Wallace, 417.* The Act of 1823 divided the State of South Carolina into two Judicial Districts. The Courts of the one are organized under the Judiciary Act of 1789 and that of 1869, and the other under the Act of 1856.

There is no other authority for the practice, which existed, of treating the two Courts as one, but that of the common error into which the bench and bar of South Carolina had fallen. The sanction of the late Mr. Justice Wayne cannot be claimed for a practice of which there is no evidence that he was even aware. Not more than four terms of the Court at Greenville could have been held under the Act of 1856 before the Courts were closed by the war; and there is no evidence, nor is it at all probable, that Mr. Justice Wayne's attention was ever called to the subject. Nor is there any more reason

for citing the sanction of the late Chief Justice, who was in South Carolina upon the Circuit but once, and then at Charleston.

The strongest argument, which can be advanced for the theory of the District Judge, is the maxim—which, to a limited extent, is applied to common error—*Communis error facit jus.* But it will be recollected how Lord Kenyon, in *The King vs. The Inhabitants of Eriswell, 3 Term Rep. 721,* repudiated that maxim. Referring to the case of *Baldwin et ux. vs. Blackmore, 1 Burr, 595.* He says:

* * * "I well remember that Mr. Justice Foster treated the argument with more indignation than is expressed by Sir James Burrow in his account of that case. I perfectly well recollect that learned Judge's saying that he had heard that *communis error facit jus*, but he hoped he should never hear that rule insisted upon, *to set up a misconception of the law in destruction of the law.* I should have disdained to say anything on this position unless it had received the appearance of some countenance in the cases I have mentioned, and in the discussion of this case."

In *Hart vs. Frame, 6 Cl. and Fin. 199,* it was said even *communis error* and long course of local irregularity has been found to afford no protection to one *qui spondet peritiam artis,* and Lord Denman, C. J., in *O'Connell vs. Reg.,* is said to have observed. *See Broom Legal Maxims, (7 Am. Ed.) p. 140.*

"When in the pursuit of truth we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

Another maxim is "*cursus curiæ est lex curiæ,*" but in its application there is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules and practice of the Court. As it is said, anything required to be done by the law of the land, must be noticed by a Court of Error, but a Court of Error does not notice the practice of another Court. *Broom's Legal Maxims, p. 134,*

citing *Sanden vs. Proctor, 7 B. & C., 806;* cited arg., *Bradley vs. Warburg, 11 M. & W., 455.*

Nor can the argument of expediency or inexpediency, convenience or inconvenience, affect the consideration of the question. Such arguments may be addressed to another branch of the government, but not to this.

The United States Courts owe their existence, as has been repeatedly announced by the Court, to Statute law—and to the Statute law we must alone appeal when any question arises concerning them. *Ita scripta est* is their authority and rule. It is written that the State of South Carolina is divided into two judicial districts—"*the Eastern District,*" and "*the Western District*"—and no practice can unite the distinct Courts provided for them. The misconception of the law cannot be set up in destruction of the law.

We will, in passing, refer to but one or two among the many evidences of the entire separation and distinctness of the two Courts.

First, we will mention one to which the Circuit Judge alludes, viz, that the Circuit Court at Charleston and Columbia is to be holden by the Chief Justice (under the present allotment) and Circuit Judge if present, to the exclusion of the District Judge, while on the other hand neither the Chief Justice nor the Circuit Judge can attend the District Court at Greenville if they would; but that that Court is held by the District Judge alone. It cannot be that in one and the same Court any one of three Judges can hold two of its terms, the first and third, but that the second term can only be held by one, and he the lowest in grade.

Again the provisions of the Revised Statutes, which are in the nature of a declaratory act upon their subject, direct (§ 552) that there shall be appointed for each of the States of Alabama, Georgia, Mississippi, *South Carolina* and Tennessee, one District Judge, who shall be judge for *each* of the Districts included in the State, for which he is appointed; (§ 767,) that there shall be a District Attorney appointed in each District except the Middle District of Alabama, the Northern District of Georgia, and the *Western District of South Carolina;* and after providing for the others, directs

that the District Attorney for the *Eastern District of South Carolina* shall perform the duties of the District Attorney for the *Western District* of said State; (§ 776,) that the Marshal for the *Eastern District of South Carolina* shall perform the duties of the Marshal for the *Western District.*

§ 555 provides that a Clerk shall be appointed for each District Court by the Judge thereof, except in cases otherwise provided for by law.

In *Toland vs. Sprague, 12 Peters, 300,* this Court declared that the Circuit Court of each district sits within and for that district, and is bounded by its local limits; that whatever may be the extent of its jurisdiction over the subject matter of suits in respect to person and property, it can only be exercised within the limits of the district, and the same was recognized in *United States vs. Dawson. 15 How., 467,* both by Mr. Justice Nelson, who delivered the opinion of the Court, and by Mr. Justice McLean, who dissented.

However defective the legislation for the practical working of the Court for the Western District, the State has in fact been divided into two districts since 1823 by an explicit Act of Congress, and the Court could not, if it would, ignore the Statute law of the land, nor yield to a mistaken practice. Again we say, the misconception of the law cannot be set up in destruction of the law.

(*b*) Let us now turn to the opinion of the Circuit Judge. Judge Bond declares that the two Courts are separate and distinct, and recognizes that in order to sustain the judgment the record must be stretched, or trimmed, to fit the one Court or the other. Driven to decide to which of the two Courts this record is to be assigned, the first and natural inquiry is—*where is it found?* This important question is answered by the certificate of the Clerk, endorsed upon the copy, filed as an exhibit to the bill, and which is in these words:

"*Office of the Circuit Court of the United States for South Carolina.*

I, Daniel Horlbeck, Clerk of *said Court*, acting for Jas. E. Hagood, as his deputy, do hereby certify that the accompanying twenty-six pages (twelve pages being blank, all in one handwriting,) do contain a true transcript of *the original records on file in this office*, in the case of A. T. Stewart *vs.* Kerrison & Leiding.

Witness my hand *and seal of said Court at Charleston*, this 12th day of July, 1873.

JAS. E. HAGOOD,

C. C. C. U. S. for S. C., Per DAN'L HORLBECK, Deputy."

With some reason it might perhaps be objected that a certificate so carelessly framed, is entitled to but little credit. But whether Hagood was the clerk and Horlbeck the Deputy, or Horlbeck the Clerk and Hagood the Deputy, or whether or not the "twelve blank pages" were "written all over in the same handwriting," it is at least sufficiently clear that the original record is on file in the office of the Circuit Court at Charleston.

The Act of 1789 provides that in the Districts, which have but one place for holding the District Court, the records thereof shall be kept at that place, and in Districts, which have two, at that place, in each District which the Judge shall appoint. See also *Revised Statutes*, § *562*. There is no statutory provision as to where the records of the Circuit Court are to be kept. A record, therefore, of the District Court for the Western District, must be found in Greenville. It can be no where else. It is no record any where else. But the paper relied on here as the record of a judgment in the District Court at Greenville, is certified to be on file in the Circuit Court at Charleston.

This of itself we insist is final and conclusive that the validity of the judgment depends upon its sufficiency as a record of the Circuit Court for the Eastern District, and not of the District Court for the Western District.

But the Circuit Judge, without giving his reasons, assigns the record to the District Court for the Western District, and in order that it may lie smoothly there, in one sentence, prunes away, as mere irregularities, all of which he holds were waived, the titlings, return of process, etc., which show that the record was intended for another Court. The counsel for Stewart & Co. urge that it is too late now to object to the record. *We* do not object to the record, or propose to meddle with it, but only say that it does not show a valid judgmeht, giving priority as a lien upon an estate in which we are interested. But with some reason we may object to Stewart's counsel now tinkering with this "judgment," after so many years since it was entered. It must stand or fall as it is. If sufficient, well; if not, it cannot now be aided by friendly construction. And if it could, the Circuit Judge, by

his own ruling, does not sit in the Court which might correct it. He holds that it is a judgment of the District Court for another District; it pertains then to that Court alone to remedy its defects.

"If in making up the record, through the inadvertence of the Clerk a mistake has occurred, the only mode of correcting it is by application to the Court who gave the judgment. and who have a right at all times to correct clerical errors." 2. *McLean*, 514

But if the Circuit Court had jurisdiction to cure the defects of the record, how must it proceed?

There is one cardinal principle of amendment. There must be something to amend by, something to which all other parts of the record must conform. *Tidd's Practice, 161, et passim.* To amend the record so as to sustain the judgment in this case, there is one part of it that *must* stand or the judgment falls, and that is the *Postea and Venire.* But it is manifest that no judgment upon the verdict of a jury at Greenville could be entered in the Court at Charleston. So to sustain this judgment, it had to be assigned to Greenville, and the record considered as amended to suit. But this is commencing at the wrong end.

In Virginia, the question, what is a common law record? was answered thus: "*It is the writ for the purpose of amending by,* if necessary," all the pleadings, etc. (*Freeman Judgments,* § *78.*) And this was undoubtedly the correct answer.

In the case of *King vs. King*, M. T. 1738, C. P., quoted in *Petersdorff's Abridg't, Title Amendment* (*a*), p. 510, it is said:

Per Cur: The motion is to amend the declaration and original, but in fact it is but an amendment in the latter; for if we grant the amendment in the original the declaration may be amended of course, so that the question will be whether he can amend the original. And as to that, there are two rules by which we are to be governed—the one is that no amendments in the original writs can be made, unless it be the misprison of the Clerk; the other, that nothing can be amended unless there is something to amend by.

In speaking of the Statutes of Amendments, Tidd says, p. 713:

In order to amend upon these statutes, it is a general rule that there must be something to amend by. And, in compliance with this rule, it has been determined that

(*a*) This case is cited by Petersdorff, as in 7 Mod., 250, but this reference is a mistake. The case is not to be found in Modern.

the original writ. or bill, is amendable by the instruction given to the officer, the declaration by the bill. the pleadings subsequent to the declaration by the paper-book, * * * the verdict, * * by the plea roll, * * * and the judgment by the verdict.

Thus each paper is amended by that which precedes it. The proceeding by original writ, or bill, it is true, has been long abandoned, and the Writ of Summons, etc., substituted, but the principles of amendment applies with equal force to any form of pleading. The same rule is laid down in *Brigham vs. Este, 2 Pick., 424.*

The writ, when served. must be returned into the Court by the officer who makes the service; neither he nor the attorney who gave it to him can alter or add to it. If a writ, containing no count, *nor any cause of action*, should be so returned, and the defendant should not appear, no judgment can be rendered, for the Court, in such case, are to take the declaration for true, and render judgment according to it; but in such case they have nothing to proceed upon, and the writ must, therefore, be a nullity. But suppose the defendant in such case should appear, and the plaintiff should move to file a count by way of amendment, the difficulty then would be, that there is nothing to amend; filing a count would be making a new writ, which does not come within the rule of amendments which is founded upon a sufficient cause of action defectively set forth, or upon a change in the form of declaring for the same cause of action. Amendments must be consistent with the nature of the count, or counts, originally made, and for the same cause of action.

Haynes vs. Morgan, 3 Mass. R., 208; Phillips vs. Briggs, 11 Mass. R., 246.

See also *Bacon Abridgt. Viner's Abridgt. Comyn's Digest. Title "Amendment."*

If then the record in question were now open to amendment, it must be made to conform to the writ. Let us then examine the writ.

First, it is entitled, "Sixth Circuit of the *United States of America, South Carolina District.*" Two mistakes are apparent in the title; first, that the Court was in the "*Fourth*" Circuit and not the "*Sixth*;" and next, that there is no such district as the "*South Carolina District.*" The first mistake, one which is not material, arose from the use of the form printed when the Court was in the Sixth Circuit, and the other from the common error which had prevailed. But the point of importance is, that the writ is entitled in the *Circuit Court.* It may be, that if it could be shown that this title was a mere *misprison* of the Clerk or engrosser of the plead-

ings, and inconsistent with the body of the writ, that it might be amended to conform to the rest of it. But further examination will snow that there was no misprison of the Clerk, or mistake as to the Court in the title.

The writ requires the Marshal to compel the defendants "to be and appear *before the Clerk of the Circuit Court* of the United States of America, for the aforesaid *Circuit* and District, *at the rules to be holden at Charleston*, in the aforesaid District." The teste is as follows:

"Witness the *Honorable Salmon P. Chase, Chief Justice* of the United States of America, *at Greenville*, South Carolina District aforesaid, the first Monday of August, in the year of our Lord one thousand eight hundred and sixty-six," etc.

It will be recollected that by the Act of 1789, it was provided that all writs and process issuing from a Supreme or *a Circuit* Court, shall bear teste of the Chief Justice of the Supreme Court, and if from a District Court, shall bear teste of the Judge of such Court, and shall be under the seal of the Court from whence they issue, and signed by the Clerk thereof."

This writ, it will be observed, is tested in the name of the Chief Justice, is under the seal of the Circuit Court, and signed by the Clerk of the Circuit Court, but is dated at Greenville, a place without the limits and jurisdiction of the Circuit Court. It has been held that the teste of process is amendable. *Gunnell v. Bradish, Cro. Eliz., 203.* But the drift of authorities are opposed to its amendments. But if amendable, as the teste by the Chief Justice, and seal, and signature by the Clerk of the Circuit Court, are inconsistent with the date at Greenville. We must construe the writ by the rule *ut res magis valeat quam pereat.* The title and exigency of the writ and teste of the Chief Justice, Clerk and seal of the Circuit Court, must prevail then against the date of place at Greenville; and the writ shows that the action was instituted in the Circuit Court. We desire to call attention particularly to this, because the counsel for Stewart, relying upon the well established rule that exemption from suit in any other District than that whereof the defendant is an inhabitant, or found at the time serving the writ, is a personal

privilege, which may be waived by appearance, urge that the defendants in this case have voluntarily waived the objection to the jurisdiction of the Court at Greenville; which view has been adopted by the Circuit Judge, and forms the ground upon which he sustains the judgment. It is of consequence then, to observe particularly to what, and how, the defendant did appear.

Recurring then to the writ, we find that it was not served by the Marshal upon the defendants, but that their attorneys accepted its service. What was the service then accepted? As we have seen, it was to appear *at the rules of the Circuit Court to be holden at Charleston.* It is the appearance which waives the objection to the jurisdiction. *Rhode Island vs. Massachusetts, 12 Pet. 657; The Bee, Ware, 332; Wick vs. The Samuel Strong, 6 McL. 587; Lincoln vs. Tower, 2 McLean, 485.* But there was no appearance to the District Court at Greenville. The appearance was to the Circuit Court at Charleston.

Let us look now at the declaration.

At the time of the institution of the suit, and indeed during its progress, the common law system of pleading and practice was in force in the State of South Carolina, and consequently in the United States Courts there, and Chitty was the authority upon the subject. This learned author, vol. 1, p. 263, treats of the declaration and its several parts, under several heads, the first of which are: 1. "The title of the declaration as to the *Court.*" "2. The title of the declaration as to the *time* when it is filed or delivered." "3. The *venue* in the *margin,*" etc., etc. Treating of the first, "The title of the Court," he says that every declaration shall be entitled in the proper Court, and if that title be omitted, or be merely endorsed, the Court will set aside the declaration for irregularity. The declaration in this case is entitled, and the title is this, "*United States of America, South Carolina District, Fifth Circuit—In the Circuit Court.*" The defendants then were not mistaken as to the Court to which they accepted service, but appeared to a suit in the Circuit Court at Charleston, and not in a District Court elsewhere.

The suit was upon a foreign judgment, a judgment obtained in New York, with counts upon the original cause of

action, note, goods sold and delivered, etc., and as each count was upon a transitory action, the venue could be had any where within the jurisdiction of the Court in which suit was brought. But the venue, as laid in the declaration, is material upon the point now under consideration, viz: as showing in what Court the action was considered by the pleader to have been brought. It is laid in each count, "to wit: *at Charleston.*"

The statement of facts agreed upon shews that special pleas and demurrers were filed, and argued in Charleston. So far then, we have the record of a case commenced and brought to issue in the Circuit Court at Charleston. There the record ends. The *venire and postea* attached to the record are mere nullities.

As we have seen, any given portion of the record must be amended, if necessary, by what precedes it, that the judgment must be amended by the verdict, and the verdict by the plea-roll. To amend this judgment, therefore, we must amend it so as to conform to the writ, declaration, and pleas, all of which we have seen are in the Circuit Court at Charleston. But the whole doctrine of amendments is for the correction of mistakes and errors, as the very term *jeo fails* implies. There can be no amendment against the fact. An amendment may be made to supply an omission, and, in the absence of any averment to the contrary, the law will sometimes supply, by presumption, a necessary matter, though, in fact, that matter never existed. But, as was said by the Court, in *Galpin vs. Page:*

"But the presumptions which the law implies in support of the judgments of Superior Courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed, or the averment is made. When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The *venire and postea* in this case positively aver the jurisdictional fact that the cause was tried at Greenville, before a jury there; there can be no presumption, therefore, that it was

tried at Charleston, and the subsequent record cannot be amended to conform to the plea-roll, and therefore must be regarded as a nullity.

We have thus seen that, tried by the rules of pleading, taking the writ as the starting point and requiring the declaration to conform to that, and the judgment to the plea-roll, that the record discloses a suit brought to issue, but stops there, and the judgment upon it cannot be sustained. But, for the sake of argument, let us see if it would fare any better if we commenced its examination from the other end, as the Circuit Judge does. Can the record before the Court be sustained as a judgment in the District Court for the Western District? Is there anything to support the judgment there—supposing against the fact that it was found there?

In the case of *Hollingsworth vs. Barbour, 4 Pet., 460*, it was held that, by the general law of the land, no Court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend; and in *Walden vs. Craig's Heirs, 14 Pet., 147*, that service of process, or notice, is necessary to enable a Court to exercise jurisdiction in a case; and if jurisdiction be taken in a case in which there has been no process, or notice, the proceeding is a nullity. In *Boswell's Lessee vs. Otis, 9 How., 346*, it is said, jurisdiction is acquired in one of two modes—first, as against the person of the defendant by the service of process, or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court; and in *Webster vs. Reid, 11 How., 437*, that no person is required to answer on whom process has not been served, or whose property has not been attached.

Mr. Brightley, in his Federal Digest, title, "Effect of Judgment," 71, correctly thus sums up the doctrine of the United States Courts:

"The service of process is necessary, in order to confer jurisdiction to decide upon the rights of a party; a decree without such service or statutory substitution for it is merely void."

The record produced affirmatively shews not only that there was no process in this cause, in the District Court, for the Western District, but that there was a process for the

same cause of action in another Court—the Circuit Court at Charleston. The judgment, therefore, is simply null and void. But if there had been a writ, or other proceedings, the judgment is equally void, for there is no declaration in that Court. *Tench Ringold vs. William Elliott, 2 Cranch Cir., 462.*

In *Toland vs. Sprague*, as we have seen, it was held that the Circuit Court of each District sits *within and for that District, and is bounded by its local limits ;* and in *United States vs. Dawson*, Mr. Justice McLean puts the very case. He says, in an action of ejectment, a writ of possession could not be issued to the Western District of Arkansas on a judgment in the Eastern. The Act of 1826 provides how an execution may be enforced from one district to another in the same State ; but the lien of the judgment set up in this case does not rest upon the provision of that Act.

The Circuit Judge has fallen into some errors, which we must point out, as they materially affect his judgment. Throughout his opinion he treats the case as if Kerrison & Leiding, the bankrupts themselves, were now endeavoring to set aside a judgment, to the pleadings of which they had failed to except at the proper time. He says, that notwithstanding all the irregularities, as he terms them, "*the defendants* in the action *appeared, pleaded*, and went to trial before a jury of the District Court of the Western District without plea to the jurisdiction," etc., and that "under these circumstances it must be considered that all errors in pleading and all irregularities in the titlings of the pleas or declaration, and of return to the process were waived, and even if this were not so, there is no remedy for the defendants except by appeal, or writ of error, to set the judgment aside. It cannot be inquired into in this collateral way."

Now, first, "*the defendants*," if his Honor means thereby Kerrison & Leiding, have nothing to do with this case, they are not even parties to it. They went into bankruptcy and have been discharged, and as far as they are personally concerned, have no interest in the contention, and are not attacking the judgment, collaterally or otherwise. It is their creditors who are—third persons, who, we have shown, have a right to do so. It is important to observe this, for the judgment of his Honor

rests upon this mistake. Throughout his opinion he treats the bankrupts and their creditors who are resisting the judgment, as the same persons, and thus it is he holds that Paton & Co., and the other creditors, the appellants, are bound by waiver of objection to the jurisdiction of the Court. The appellants were no parties to any proceedings but these, and are bound by nothing but the record in this case.

His Honor is equally mistaken in saying that the "defendants," whoever he meant thereby, appeared and pleaded before the District Court of the Western District. As we have shown, Kerrison & Leiding, against whom the judgment is claimed, appeared to a writ issued from the Circuit Court, at Charleston, the exigency of which was that they should appear to the rules of that Court at Charleston, and that they did so appear, at Charleston, and that they pleaded to the declaration filed at Charleston, entitled in the Circuit Court, with venue laid at Charleston. It cannot be said that they "went to trial before a jury of the Western District without plea to the jurisdiction," for the writ and declaration to which they pleaded were in the Circuit Court at Charleston, and the pleadings made up and issue joined in Charleston. There was, therefore, up to the issue, no improper jurisdiction exercised to which to plead.

But they did, under the common practice and common error, go to trial at Greenville. It remains, therefore, to consider the effect of their doing so. Did they, by doing so, knowingly consent to confer upon that Court jurisdiction in their case, and if so, could they so confer jurisdiction?

Did they, by going to trial at Greenville, waive objection to the jurisdiction of the Court?

This Court, in a series of cases arising under the jurisdiction upon petitions for removal of causes from State Courts, where the petitioners have gone on with the trial after petition, has applied the maxim that consent cannot give jurisdiction.

In the first case, *Gordon vs. Longest, 16 Peter, 97*, while the fact is not specially noticed in the report of the case, it is apparent from it that the parties had gone on with the cause even to appeal after their petition. This Court, in that case,

say that every step subsequently taken, that is, after the petition was filed, in the exercise of a jurisdiction in the case, whether in the same Court, or in the Court of Appeals, was *coram non judice*. So in the case of *Kanouse vs. Martin, 15 How., 189*, it is evident that the petitioner continued to defend his cause in the State Court, after the State Court had lost jurisdiction by the filing of his petition, but he was not held to be bound thereby. But in the case of *Insurance Company vs. Dunn, 19 Wall, 214*, the point was distinctly made. It was insisted that the Company, by appearing and contesting the claim in a second trial in the State Court, after the jurisdiction of that Court had been lost, had waived the question of jurisdiction, and was bound by the judgment; but this Court held that the maxim, that consent cannot give jurisdiction, applied with full force.

In these cases the jurisdiction had once existed, but was destroyed by the act of the petitioner, who, however, notwithstanding his own acts, continued, it was said, to recognize the jurisdiction by defending each his cause, but in our case the Court never had jurisdiction. The record to which Kerrison & Leiding had appeared was, without their consent, removed to another Court, in which they followed it to defend themselves, but they could not by so doing confer a jurisdiction which did not exist.

A waiver is thus defined by Chief Justice Shaw, in *Capen vs. Washington Ins. Co., 12 Cushing, 517*: "A waiver is the intentional relinquishment of a known right, and there must be both *knowledge* of the existence of the right, and an *intention* to relinquish it." This definition is quoted and adopted by Mr. Bigelow, in his treatise on the law of Estoppel, p. 506.

But in this case there was no knowledge of the existence of the right of Kerrison & Leiding to refuse to go to trial at Greenville. They were as much under the common error that regarded the Courts as one, as the counsel for Stewart, who insisted upon a trial of the cause at Greenville, and as the Court who took the dockets and records there and required their attendance. They had no intention to relinquish any right in the matter. There was, therefore, no waiver of objection to the jurisdiction of the Court at Greenville, if that

jurisdiction had obtained. But had it obtained? We have examined the record, and have seen that it is the record of an action commenced and prosecuted to issue in the Circuit Court at Charleston, and attached to it we have found a *venire and postea* at Greenville. How this verdict was removed there the record itself does not show.

The Circuit Judge speaks of the "defendants" *waiving* irregularities, etc., but we apprehend that something more positive than mere *waiver*, if there was a waiver, is necessary to *confer* jurisdiction. If, for instance, the record showed a writ issued from the District Court, for the Western District, upon which the defendants had appeared, their appearance to that Court would have been a waiver of their personal exemption from its jurisdiction. This the United States Courts have repeatedly held, and in doing so have held but a common doctrine. Thus in the English case *Oulton vs. Radcliffe, Law Reports, 9 C. P., 189,* where the plaintiff resided at Northampton, and the defendant in Shropshire, the writ was issued out of the Court of Common Pleas at Lancaster, and was sent to the defendant at Stone, in Staffordshire, which was also beyond the jurisdiction, and the defendant's attorney appeared to it; it was held that the irregularity was cured by the appearance. But mark, in this case, *Oulton vs. Radcliffe*, there was a writ from the Court claiming jurisdiction, and appearance to it; and, doubtless, there are numerous like instances in the State Reports, but there is nothing whatever upon the record before us showing any summons from, or proceedings in the District Court, for the Western District, to which the "defendants" (Kerrison & Leiding) were parties. By a contradiction of terms, the proceedings in the District Court commences with a "*venire* and a *postea*." What was the "*therefore*" it was commanded the Marshal to summon forty-eight good and lawful men to appear before the *Justices* at Greenville, the record does not disclose, and as to what happened before the "*afterwards*," when it is alleged the defendants came before the jury, the record in that Court is likewise silent.

It will, doubtless, be replied that the statement of facts agreed upon explains all this; but we submit that no evidence, and so no statement of facts, can supplement the record; the judgment must prove itself.

Prout patet per recordum, is the only way in which a judgment can be pleaded. *Com. Dig. Pleader, Sec. 29.*

"When the existence of a judgment is put in issue upon a plea or replication of *nul tiel record*, it must be proved by *the production of the record itself*, which is inspected by the Court wherever it is, if it be a record of the same Court, or if of a different Court, a *certiorari* must be sued out bringing it in."

Tidd's Pr., 943; Greenleaf's Evidence, Sections 501, 502, Vol. 1: Freeman on Judgments, Sec. 407; 2 Arch. Pr., 38.

See, also, Greenleaf, § 538, Ibid., where it is said of the record, "*it is, therefore, the only proper legal evidence of itself*," and Starkie's Evidence, Vol. 1. page 151, to the same effect.

In *Lincoln vs. Tower, 2 McLean, 474*, it is said when the matter of record forms the gist of the action, and issue is joined upon *nul tiel record*, the record itself must be brought into Court, or an exemplication of it. And so in *Kanouse vs. Martin, 15 How., 210*, it is said upon a writ of error this Court looks only at the technical record, and affirms or reverses the judgment, according to what may appear thereon. *Ingle vs. Coolidge, 2 Wheat., 363; Fisher's Lessor vs. Cockerell, 5 Pet., 248; Reed's Lessors vs. Marsh, 13 Peters, 153.*

The record produced was a record of the same Court in which this case was tried, and from which an appeal is taken, to wit: the Circuit Court at Charleston, and it could, therefore, only be proved by an inspection of the record itself; no assistance could be derived from evidence *aliunde*.

An irregularity may be waived, a nullity never can be waived. *McNamara on Nullities, p. 6; Levi vs. Ward, 1 Sim. and St., 334.* We have seen that the Court has repeatedly held that a judgment, founded on proceedings which have no foundation in process, served or accepted, is a mere nullity, no waiver, therefore, can give it effect.

The record shows no consent whatever in the case; but if consent had been proved, *could* consent have conferred jurisdiction? By a long current of decisions, this Court has held that the jurisdiction of the United States Courts must appear upon the face of the record, and in one case, *Capron vs. Van Noorden, 2 Cranch, 126*, it has gone so far upon this point as to allow one to assign for error his own omissions, in the pleadings in the Court below where they go to the juris-

diction. In the case of *Rhode Island vs. Massachusetts*, it is said: "But as the Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties, over which the constitution and laws have authorized it to act; *any proceedings without the limits prescribed is coram no judice, and its action a nullity:* and, in *Scott vs. Sanders, 19 How., p. 472*, Mr. Justice Daniel says: "There is no such tribunal of the United States as a Court of general jurisdiction, in the sense in which that phrase is applied to the superior Courts under the common law; and, even with respect to the Courts existing under that system, it is a well established principle *that consent can never give jurisdiction.*"

A recent case in California is much to the point. *Bates vs. Gage, 40 California, 183.* From the report of this case, the pleadings, &c., seem to have been regular up to the trial. Among others there appears to have been two Courts in the same judicial district, one for the County of San Joaquin, and one for the County of Tuolumne. The statute provided that each term of the Court should be held until the business was disposed of, or until the day fixed for the commencement of some other term in the district. The other facts appear in the opinion of the Court, from which we quote:

"This cause was tried in the County of San Joaquin on the day the term of the Court for the County of Tuolumne —which is in the same district—commenced as fixed by law. At the trial the attorneys, apparently having some doubt as to the regularity of the proceeding, entered into a stipulation that 'all objections as to the jurisdiction of the Court as to hearing and trying the case at this time, and all objections as to irregularities or informalities in the case as it now stands,' and 'all objections to the trial of this cause this day are, by both plaintiff and defendant, fully and completely waived.'

"This stipulation was signed by both the attorneys and the parties. Nevertheless the appellant makes the objection in this Court, and maintains that he is not bound by the stipulation, because parties could not, by their stipulation, confer jurisdiction upon a Court when in the nature of things it could acquire no jurisdiction—they could not by their stipulation make a Court.

"This point, as to the stipulation, is obviously well taken. The Court could not legally be holden on that day in the County of San Joaquin, and the trial was, therefore, not before a Court. The precise point has been decided several times in the State. *Smith vs. Chichester, 1 Cal., 409. Dominque vs. Dominque, 4 Cal., 186. Norwood vs. Kenfield, 34, Cal, 329.*

"By operation of law the Court was adjourned prior to the trial of the cause, *and the parties by their stipulation cannot confer jurisdiction.*"

The record produced in this case from the Circuit Court at Charleston, shows a case commenced there by writ, appearance to that Court—declaration filed there, special plea filed and demurred to, there, and issue joined there. If then the attorneys had entered into a *written stipulation consenting* to the trial of the case by the Court in Greenville, the defendants never having been served by writ to appear, and never having appeared there, the stipulation and consent would have been of no effect, and the judgment a mere nullity, as in the language of Mr. Justice Daniel, "consent can never give jurisdiction," and in the language of the Courts of California, "parties by their stipulation cannot confer jurisdiction."

But there was no such consent, no such stipulation between the parties. Both plaintiffs and defendants were acting alike under a misconception of the law, but that cannot be allowed to destroy the law. Both parties were, alike, acting under a common error, but the difference between them is this,—that Stewart & Co. now seek to establish a preference obtained by a misconception of the law, the appellants merely resist. As against others, at least, Stewart & Co. must show affirmatively the existence of a judgment. They cannot do this by showing a common error. They produce a record certified to be on file in the Circuit Court, at Charleston, and call it a judgment in the District Court, at Greenville. *a.*

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a. During the preparation of the argument two cases have been reported in the legal journals bearing strongly upon the question under consideration.

The first, *Stanley vs. The Chicago, Rock Island and Pacific Railroad*, Supreme Court, Missouri, May Term, 1876, reported in *Central Law Journal*, July 7, 1876, p. 430,

View the record as we may, examine it from whatever point we choose, it is a mere *nullity* which no consent or waiver can aid.

As the "judgment" of Stewart & Co. *vs.* Kerrison & Leiding was the foundation of the proceedings in the State Court upon which decree was obtained, setting aside the deed in trust for the creditors of Kerrison & Leiding, without which they could not impeach the deed for fraud, *Coleman vs. Croker; 1 Ves, 160*, and as that judgment is now seen to be a nullity, it results that not only have Stewart & Co. no lien in preference to the other creditors, but that the whole proceedings in the State Court falls with it.

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4. *If the creditors of Kerrison & Leiding, who accepted the terms of the deed, or any of them, are not bound by the decree in the State Court, is that deed valid?*

Having thus shown that the creditors, who accepted the terms of the deed from Kerrison & Leiding, are not bound by the decree in the State Court declaring it invalid, and that they are free now to attack the judgment upon which the proceedings under which that decree was based, and having shown that that judgment, thus open to question by them, is a mere nullity, we come now to the consideration of the deed itself.

But here we are yet again met with an objection interposed to prevent an examination of that instrument upon its merits, viz: that as the validity of the deed depends upon the construction of an English statute, 13 Elizabeth, made of force in the State of South Carolina, that it is to all intents

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was for a case of petition for removal from a State Court, in which it was held that the defendant did not waive the question of jurisdiction, by participating in the subsequent trial of the cause. In the second, *Hoagland vs. Creed, Chicago Legal News*, July 8th, 1876, the parties had agreed to have a case heard by a member of the bar who afterwards signed a bill of exception, as Judge of the Circuit Court, held: That no consent can confer jurisdiction in such a case, and no valid judicial decision can be thus rendered, and not even a valid award, since the agreement is not a submission to arbitration.

These cases repeat the well established rules that participating in a trial before a Court, without jurisdiction of the cause, cannot confer jurisdiction, nor can consent nor agreement make a Court.

and purposes a statute of the State, and that since it is a well settled rule that, in cases depending on the statutes of a State, the Federal Courts will adopt the construction of the State Courts, that even if true, that the creditors, whom we represent, are not bound by the decree of the State Court as *res adjudicata*, that the Courts of the United States will, at any rate, adopt the construction of the statutes by the State Courts, whether they approve it or not.

It is no doubt the settled rule of the Federal Courts that in cases depending on the statutes of a State, and especially concerning land, the *settled* construction of these statutes by the State Courts is to be adopted. See the long list of cases cited by *Brightley*, title, "*Construction.*" "*Effects of State Decisions.*" This rule, however general, is not without its exceptions, as was held in *Pease vs. Peck, 18 How., 598*, and again declared in strong language, in *Gelpcke vs. City of Dubuque, 1 Wall., 206.* But in our appeal to this Court to construe the deed in question, we have not to ask its consideration upon any exceptional ground, for this Court has always maintained its right to construe deeds and wills for itself. In *Foxcroft vs. Mallett, 4 How., 353*, it held that the decision of a State Court, construing a deed by the rules of the common law, is not binding upon it. Mr. Justice Story had previously so held upon the Circuit, *Thomas, et al., vs. Hatch, 3 Sumner, 176.* The same rule prevails in regard to wills. In *Lane vs. Vick*, 3 *How., 476*, the Court refused to follow the construction of a will adopted by a State Court. The question how far the United States Courts are bound to follow the State Courts, was very fully discussed in *Swift vs Tyson, 16 Peter, p. 1*, the conclusion of the Court being that the rule was limited in its application to State laws *strictly local.*

But this Court has, moreover, on more than one occasion, declared that where English statutes are adopted into State legislation, their known and settled construction is considered as silently incorporated into the Acts.

This Mr. Justice Story declared in delivering the opinion of the Court, in *Pennock & Sellers vs. Dialogue, 2 Peters, 2* and Chief Justice Marshal, in *Cathcart vs. Robinson, 5 Peters, 279*, recognized the rule in regard to the very statute under

consideration, *13 Eliz.* He says, the received construction in England at the time these statutes were admitted to operate in the country, and indeed to the time of the separation, may very properly be construed as accompanying the statutes themselves, and forming an integral part of them, and that that rule had been universally observed by this Court.

See, also, *Cooley, Cons. Lim., 52.*

The Courts of the United States, too, as we have seen, reserve to themselves the right to construe deeds by the common law independently, and, indeed, if necessary, in contradiction to the State Courts. Now, the Acts of 13 and 27 *Eliz.* are but declaratory of the common law.

This was held by Lord Coke, *Co. Litt., 76 a, 290 b,* and Mr. Roberts opens his treatise on *Fraudulent Conveyances,* with the sentence: "It was an observation of Lord Mansfield (Cowper, 432), that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law was calculated to attain every end proposed by the statutes of 13 and 27, Eliz."

And so Chief Justice Marshall, in *Hamilton vs. Russell, 1 Cranch, 309,* says of the Acts of Virginia upon the subject, that so far as respects fraudulent conveyances, they were intended to be coextensive with the Acts of 13 and 27, *Eliz.*, and that these Acts are to be considered as only declaratory of the common law, and that the decisions of the English judges therefore applied to the case. See, also, to the same effect, note to *2d Am. Ed., Roberts Fraudulent Conveyances, p. 11, Hundal vs. Wilder, Ex'or, 4 McCord, 294; Clements vs. Moore, 6 Wallace, 312; Bump on Fraudulent Conveyances, p. 58.*

This Court is free, therefore, to construe the deed in question by the rules of the common law, notwithstanding any construction of a State Court, and particularly under the circumstances of this case have the creditors of Kerrison & Leiding the right to call upon it to do so. As it has been seen in the course of the argument, they are citizens of another State, who are in no wise connected, except by publication, with the proceedings in the State Court under which the deed was there construed, and if they have the

right, as we have shown, to appeal to the Court, the Court will construe the deed by the rule of the common law under which they accepted it, and not by any peculiar State construction.

Again, it is only the *settled* construction of the State Courts, which are in any case regarded as law by the Courts of the United States. *Green vs. Neal, 6 Peter, 291; Suydam vs. Williamson, 24 Howard, 427; Morgan vs. Curtenins, 20 How., 1.*

And so at the last term of this Court it was held that it is a *uniform course* of decisions which it follows, *Townsend vs. Todd.* And again, "we have always followed the highest Court of the State in its construction of its own constitution and laws. It is only where they have been construed differently at different times, that, in cases like this, we have adopted, as a rule of action, the first decision and rejected the last. *This has been done on the ground that rights acquired on the strength of the former decisions, ought not to be lost by a change of opinion in the Court. Town of Elmwood vs. Marcy.*

Before we conclude this argument we will show that the construction of the deed by the Courts of South Carolina is contrary to the current of previous decisions in the State. But not only so; it will be seen from the report of the case of *3 Rich., N. S., 266*, that the other members of the Court do not commit themselves to the reasoning of the judge who delivers the opinion, but only concur in the result. The decision in the case cannot, therefore, be cited as the settled construction of the State Courts, but the deed is open to the consideration of this Court by the rules of the common law and the statutes declaratory of it.

Before examining the deed, we wish to call attention particularly to the fact that there is no question in this case of actual or moral fraud. The *bona fides* of the transaction has been admitted throughout this litigation. Judge Carpenter, in delivering the opinion upon the Circuit, says: "I use the terms 'defraud,' and 'fraud,' in their legal sense. I see nothing in the case to warrant the imputation of moral fraud." *3 Rich. N. S., 273.* We are aware that authorities may be cited to the effect that the statute refers to a legal and not to a moral intent. But the distinction has not been univer-

sally received. Chief Justice Ruffin, in the case of *Hardy vs. Skinner, 9 Iredell's Law, 191*, held that the deed could not be regarded by the Court as fraudulent in law upon its face, the opposing creditor having admitted that it was not fraudulent in fact. *Burril Assignments, p. 189;* and see Mr. Justice Nelson's discussion of the subject of evidence of intent, and the necessity of its conclusiveness, in *Cunningham vs. Freeborn, 11 Wend., 240.*

The general rule is that "the *onus* is upon the creditor who assails an assignment to show that it is in plain violation of the law. It is a universal rule in the construction of all deeds that fraud is never presumed." *Bump on Assignments, p. 368.* Mr. Bump adds, that the reason of the rule rests upon such plain principles of justice and propriety that it needs not the force of argument or the weight of authority to support it. But how much more rigidly should the rule be enforced when the creditor who assails the instrument, and the Court which examined into its circumstances, unite in exonerating the makers of the deed from all imputation of moral or intentional wrong? Stewart & Co. to succeed, should *demonstrate* to the Court that the deed is in *plain violation of the law.*

Stewart & Co. make no objection to the deed under the Bankrupt Act. That Act, if it applied to this case, would not suit their purpose. Their object is not to obtain a proportionate share of the property, that they could have secured by accepting the terms of the deed. They seek a preference and will be content with nothing less. They demand to be paid in full, and would leave the rest of the creditors to divide among them what they, Stewart & Co., leave. They claim the preference of an execution; priority by virtue of a process, of which, as Judge Williard, in delivering the opinion of the Supreme Court of the State in this very case, observes: "It is a mere rule of practice based on convenience; it has often been said to put creditors in a race of diligence, but that race is more often won by the hard-hearted or the lucky adventurer, than by diligence seasoned with mercy."

But even under the Bankrupt Law, we are confident that this deed would be sustained by this Court.

In *Tiffanny vs. Boatman's Institution, 18 Wallace, 388*, this Court says, there is nothing in the Bankrupt Law which interdicts the lending of money, to a man in embarrassed circumstances, if the purpose be honest, and the object not fraudulent, and that it makes no difference that the lender had good reason to believe the borrower insolvent, if the loan was made in good faith. "If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing the assets, it is not only not forbidden, but is commendable, for every one is interested that the business should be preserved, and in the nature of things he cannot borrow money without giving security for its payment," etc.

Does not the same reasoning apply to the granting of time to the debtor to enable him to resume business? and would not the Court sustain the giving of security to obtain time as well as to obtain money? Nay would it not rather?

See also *Cook vs. Tullis, 18 Wall, 332.*

In construing deeds under the English Statute, the rule of this Court has been, as we have seen, to consult first the decisions of the English Courts prior to their adoption into the legislation of this country, but throughout this long litigation no English authority has been relied upon as invalidating the deed in question. Nor indeed could any have been found to suit the purposes of Stewart & Co., for they insist that the deed is an assignment, and assignments for the benefit of creditors are, for the most part, an American device, and of comparatively modern origin. *Bump on Fraudulent Conveyances, 333.* The earliest mention of such a deed in the English Reports prior to 1805, is the case of *Bomford vs. Baron, in 1787*, reported in a note to *Edwards vs. Harben, 2 T. R., 294.* The deed then is to be construed by the common law, with the aid of the subsequent decisions of the Courts of England and of the States, including those of South Carolina, which though this Court does not admit as absolute authority, it respects. *Cathcart vs. Robinson, 5 Peters, 280.*

Stewart & Co., in their answer, say that they declined to accept the provisions of the deed, (1) because no disposition was made of any surplus which might remain of the pro-

ceeds of the real estate after paying the creditors who accepted, or (2) of the rents and profits of the assigned estate by reason whereof a trust as to the said surplus, and also of the rents and profits, resulted to the said Kerrison & Leiding, who, accordingly, with the assent of the said Charles Kerrison, continued in the absolute control and enjoyment of the said real estate, collected the rents and profits, and applied the same to their own use, and not the payment of their debts; (3) because, at the time of the execution of the conveyance, that Kerrison & Leiding, in addition to the assigned real estate, were possessed of a large amount of personal property, consisting of choses in action, which they reserved for their own use; and (4) because Kerrison & Leiding had no right to require them to release a portion of their just demands, and to receive the balance by instalments prescribed by them.

As we have said, Stewart & Co. insist that the deed in question is an assignment, and that the Courts of the State have held it such. The creditors who accepted the deed, on the other hand, insist that the deed is in the nature of a mortgage, and not an assignment. Before then we discuss the objections to it made by Stewart & Co., we must consider its nature.

Mr. Bump, in his treatise on Fraudulent Conveyances, pp. 333, 334, says:

"There is also a distinction between an assignment and a deed of trust in the nature of a mortgage; the former conveys the property absolutely to a trustee, to be sold for the payment of the debts named in it, and the latter purports to be a security for a debt, with power to sell if the debt is not paid. The former is an absolute and indefeasible conveyance of the subject-matter thereof for the purpose expressed, whereas the latter is conditional and defeasible. A deed of trust in the nature of a mortgage, is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property."

Now let us try the deed by Mr. Bump's rule. The deed recites that in order to enable Kerrison & Leiding to resume business a majority of their creditors had agreed to take their notes "*secured*" by a conveyance to an approved trustee of the real estate thereinafter fully and particularly mentioned and described, and intended to be conveyed to the said Charles Kerrison, trustee of the second part, *in trust for the better securing of the said notes, &c.* This recital shows that

the agreement was for a *security*. Not for an absolute sale. The creditors in the first instance were not to look to the proceeds of sale for their payment, but to the notes which they were to take, and which Kerrison & Leiding were to pay. The payment of which was to be *secured* by the conveyance to Charles Kerrison. The *habendum* of the deed is in the first place in trust "*to hold the said premises as a security for the several and respective parties*," who should take the notes and accept the terms, "and in the next place, in trust, *unless the said notes be paid by the parties hereto of the first part in the meantime*," then to sell or mortgage, with power to sell at his discretion "to meet the said notes at maturity."

The *habendum* agrees with and carries out the recital. The trustee, in the first place, is not to sell, "*but to hold*" the premises "*as a security*." The conveyance is defeasible—defeasible upon the payment of the notes by Kerrison & Leiding. The trustee is not to sell *unless* they fail to pay. This deed is in the language of Mr. Bump, in the paragraph from which we have just quoted, "a deed conveying property to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt, when due, with power to the trustee to sell the property, and pay the debt in case of default on the part of the debtor, *is a deed of trust in the nature of a mortgage*."

A sentence in *Burrill, on Assignments, p. 33*, to wit: That instruments of the kind, we are considering, "are, in fact, mortgages, with the qualities of an assignment in trust superadded, or assignments to take effect at a future day," is quoted, by Stewart's counsel, as showing that the same principles are applicable, whether the deed be regarded as an assignment or a mortgage. We venture to criticise the language of Mr. Burrill, in this instance. In the first sentence of his work he defines an assignment as a transfer, or setting over of property, or of some right or interest therein from one person to another. An assignment thus defined may be for immediate sale, or in payment of a debt, *ipso facto*, or by way of mortgage. So Mr. Burrill more correctly states the difference between assignments for the one purpose or the other, on page 34, where he says, that such assignments are

to be considered as exceptions to the ordinary form of an assignment which is that of an absolute transfer to sell and pay at all events, and in this respect the distinction between assignments, and mortgages is apparent. It is important, we think, to bear this distinction in mind so as not to be misled by authorities which are cited in construction of deeds under the general term "assignments." It matters very little whether a deed may be called an assignment or not, provided we bear in mind that, though so called, it still may be a mortgage.

In the case of *Tompkins vs. Wheeler, 16 Peters, 106*, in this Court, as Mr. Burrell observes, (p. 32) the conveyance which was to *secure* a certain class of creditors is called a deed of assignment *or mortgage*. The report of the case, it is true, is not very precise as to the nature of the deed, but it is twice called an "*assignment or mortgage*." Mr. Burrell, (p. 32) cites several cases in which assignments, as they were called, were held to be mortgages in legal effect. In one, a case in Alabama, a voluntary conveyance by a debtor to a trustee of lands and personal property for the purpose of securing the payment of debts, some of which were past due, and others running to maturity, fixing a distant day after the maturity of the youngest debt, and providing that until then the debtor should continue in the possession and use of the property, was held to be not materially different from a mortgage under the same state of facts. (*Elmes vs. Sutherland, 7 Ala., 262.*)

But the distinction has been most clearly taken in Pennsylvania, under the statute requiring the record of assignments for the benefit of the creditors within a certain prescribed time.

In the case of *Ridgeway vs. Stewart, 4 Watts and Sergt., 383*, a conveyance in trust of real and personal estate, given to secure the payment of a debt, had been construed upon the Circuit to be an assignment coming within the terms of a statute providing that "any voluntary assignment of his (the debtor's) estate, real, personal, or mixed, to any person or persons *in trust, for the use of his creditors*, or *in trust for the use of such person or persons to whom such assignment may be so*

made, and other creditors of the said assignor," should be recorded within a given time. But the Supreme Court, upon appeal, said :

"It is perfectly plain from the language just recited, that the assignments required by the 5th Section of the Act to be recorded within the thirty days are those *absolute* transfers made by debtors in embarrassed or in insolvent circumstances of their estate to trustees, for the benefit of their creditors, that is, for the purpose of being turned into money, and applied by the trustees to the payment of the debts owing by the assignors.

But the deed of the 22d of March, 1839, under which the plaintiffs claim, is an entirely different instrument. It is a *mortgage* of the goods described in it, and not an *assignment*, or absolute transfer, or conveyance thereof, but *conditional*, merely. In other words, a pledge of the things therein mentioned *as a security* for the payment of the money therein specified, according to the stipulation therein contained.

And so again in the case of *Manufacturers and Mechanic's Bank vs. Bank of Pennsylvania, 7 Watts and Sergt., 335,* in which case, as in that we are considering, the deed recited that the grantor was desirous of *securing* to the bank the payment of a certain draft and the *habendum* was in case default should be made in payment of the draft at maturity, to sell the premises or so much thereof as might be necessary, and in case of residue to pay over and re-convey to the grantor for his own proper use, the same Court says :

"The lien of the Bank of Pennsylvania thus becomes the second piece on the board ; and the objection made to it is, that the conveyance by which it was created is not a mortgage, but an assignment in trust to pay a particular creditor ; and that, as it was not recorded within the period prescribed by the statute, it is consequently void. But it is clearly a mortgage, limited to a trustee in fee, with a power to sell; and the statute has regard, not to a conditional conveyance which may revest the property in the debtor, but to an absolute assignment to sell and pay at all events. This is too plain for illustration.

Besides these cases, Mr. Burrill also refers to another very much to the point, *Leitch v. Hollister, 4 Comstock, 211,* in which it is said of an assignment of a chose in action to certain creditors, for the purpose of *securing* their demands," the conveyance whatever may be its form, is in effect a mortgage of the property transferred."

In a late case in England, *Alton v. Harrison, Law Rep., Chan. App. 4, p. 622,* in which the debtor in order to secure his creditors, conveyed to trustees all his property, upon certain trusts, providing that if the debtor should pay the credi-

tor in a certain time, there should be a re-conveyance and re-assignment, and that the trustees should permit the grantor to hold, use, occupy and enjoy the premises, and to receive the rents and profits thereof for a certain time, and that in case of default of payment, then in trust that the trustees should sell; Sir G. M. Giffard, L. J., overruling an objection as to the retention of the property, says of the deed, that it was in effect a mortgage not to become absolute for six months, unless process should be previously issued against the mortgagor.

In the opinion filed in the Supreme Court of the State, it is said the deed is not in the form of a mortgage; that a mortgage strictly considered is a sale and conveyance, subject to condition or defeasance. *3 Rich. N. S., 288.* But "the precise form in which the condition is expressed or the name given to the transaction by the parties is immaterial, more especially in equity, provided the substance and intent distinctly appear." *Hilliard on Mortgages*, § *37.* Thus, Mr. Hilliard continues, a condition that the conveyance shall be void in a certain event, is not absolutely necessary to a mortgage, and cites *Steel v. Steel, 4 Allen, 417.* In this case the Supreme Court of Massachusetts says:

"It seems to be now a well settled rule of law, that any conveyance of lands, intended, by the parties making it, *to be a security* for the payment of money, or the performance of some prescribed act, constitutes a mortgage. 1 *Washburn on Real Prop.*, 479; *in Lanfair vs. Lanfair*, 18 *Pick.*, 299. the same proposition is affirmed by the Court in the concise, but plain statement, that if the instrument be made a security for the payment of a debt, or the performance of a duty, it is a mortgage, to which is added, that in order to ascertain and carry into effect the intention of the parties, an enlarged and liberal view should be taken, and that the substance, and not the form of expression, is that which is chiefly to be regarded.

And so Mr. Hillard says a deed made to secure certain debts recited therein is a mortgage, and cites several State decisions to that effect. In the case *Bell vs. Carter, 19 Eng. Law and Equity, 56*, it was held that the object of the trust being to *secure* money, in was in the nature of a mortgage, though no equity of redemption was expressly reserved.

The avowed purpose of an ordinary assignment is alike for the release of the debtor as for the benefit of the creditor.

There would be no object in one giving up his property, and remaining subject to his debts. The law, in its severity, would do that for him. The consideration to the debtor is the release. Here then is a test in this case. Does this deed require any release? None at all, except, of the doubtful claim to interest during the war. A creditor accepting it might have exhausted the property given to secure his note, and then sued Kerrison & Leiding for any balance still due. The deed was simply a security for the notes, "an assignment," if an assignment it be, but an assignment in the nature of a mortgage.

Though, then, the deed in question be an assignment under the definition of Mr. Burrill, that is a transfer, or setting over of property, or of some right or interest therein, from one person to another, it is, nevertheless, a mortgage, or in the nature of a mortgage, for its very object as set out in the recital, is to *secure* certain debts, and this purpose is fully carried out in the deed itself, the *habendum* being to secure certain notes; notes which Kerrison & Leiding were to pay.

But there is another distinction to be taken in reference to the nature of this deed. Mr. Bump, defining what are "assignments," says, p. 333:

"It is true that deeds of composition have been used for a long time, but there is a manifest distinction between the two instruments. An assignment is a transfer by a debtor of the whole, or a part of his effects to some person in trust to pay his creditors A composition is a *contract* between a debtor and one or more of his creditors, by which it is agreed that the debtor shall be discharged on his transfer to such creditor or creditors of certain stipulated effects, to be held by them absolutely. A mere glance will show an essential distinction between the two transactions. An assignment is the voluntary act of the debtor The creditors need not to be consulted, nor need they be parties to it. A composition is necessarily the result of a treaty with the creditors severally, and the creditors are parties to it."

Compositions are much less obnoxious to the law than assignments; because the one is the arbitrary act of the debtor, the other the result of treaty between the creditor and debtor upon a full understanding of his affairs. Compositions are as old as commerce itself. They have been termed private bankruptcies. The propriety of such compositions is recog-

nized by the late provision amendatory of our own bankrupt law, allowing two-thirds in number, and one-half in value, of the creditors to accept compositions, which, when so accepted, are binding upon all.

Stewart & Co., in their answer to the bill in the proceeding, thus describe the deed, and give the circumstances under which it was executed:

"Further, say that towards the close of the year 1866, the said Kerrison & Leiding being then indebted to these defendants and other persons to a very large amount for goods and merchandize purchased prior to the late civil war applied to and requested their creditors *to release the interest which had accrued upon their claims, prior to the first of June*, 1865, and to accept and take their notes dated the first day of December 1866, payable, with interest, from the 1st June, 1865, two and three years after the said date, in full discharge of their respective debts.

That these defendants have declined to comply with the said requests and the said Kerrison & Leiding *having induced a majority, in number and value, of their creditors to accept their offer of compromise* afterwards, to wit, on the first day of May, 1867, for the purpose of coercing these defendants *to accept the said composition* in common with the other creditors conveyed, &c, &c."

It will be then seen that Stewart & Co., themselves, recognise and speak of the deed as a composition. Upon reference to the schedule annexed to the deed it will appear that out of thirty-four creditors thirty at once accepted its terms. The debts due these, it will be seen, amounted to some $40,000, without the disputed interest. Stewart & Co.'s judgment was for $9,387.77. The three other creditors soon after came into the terms of the deed, and made the number of these accepting thirty-three to one, representing over $50,000 of debt to Stewart's $9,387.77. This settlement would then be sustained as a composition under the bankrupt Act.

But we must not omit to call attention to the fact that unlike ordinary composition deeds, this did not require a release of anything but the interest that accrued during the war. For time, during which they would be free from pressure and annoyance so as to be enabled to resume business; they gave security for all they legally owed their creditors. The deed is then more of a composition deed than an assignment.

We come now to consider more particularly Stewart's objections to the deed, which may be thus enumerated.

a. The retention of the possession of the property by the grantor. *b.* Reservations in favor of grantors. *c.* Because it is a partial assignment, making preferences and requiring release, and *d.* Because, as it is said, it coerced the creditors into an indulgence of two or three years.

a. The retention of the possession of the property by the grantor.

The importance of determining the nature of the deed will be at once perceived in considering this objection. If, as we have endeavored to show, the deed is in the nature of a mortgage, there is an end of all objections to it by reason of the retention of possession, for it is notorious that the mortgagor usually retains possession until default, and in most States is entitled to possession. *Hiliard on Mortgagors, p 169.* The law of mortgages in South Carolina, it is true, is peculiar, but its peculiarity is that the mortgagor, even after condition broken, is still the owner of the land, and entitled to possession until decree of foreclosure, after opportunity for redemption. *A. A. 1791, 5 Stat., 159.*

This deed, it is true, contains a power of sale, but the power of sale does not change the redeemable character of the mortgage. *Hiliard on Mortgages, Vol. 1, p. 140. Chowning v. Cox. 1 Rand, 306.*

Mr. Bump says, p. 190:

> The possession must be compatible with the title and not the terms of the instrument by which the transfer is made. Unless the contract for sale is conditional or in trust, the possession should correspond with the title, and if the sale is unconditional, and pass the absolute right of property from the vendor to the vendee, no reservation of the possession to the vendor, in the written evidence of the sale, will exempt the transaction from the imputation of fraud in law upon the rights of the creditors of the vendor; *but there is an essential difference between the effect of a possession retained by the maker of an absolute bill of sale, and the possession retained by the maker of a mortgage.* * * * * * * In case of mortgages, the possession of the mortgagor is not inconsistent with the terms of the contract, for before condition broken, it is uncertain whether the property will vest absolutely in the mortgagee or not, and nothing is more common than to suffer the mortgagor to retain possession until this may be ascertained."

But if the assignment were not in the nature of a mortgage, but an absolute conveyance, the rule that possession is presumptive of fraud, Mr. Bump says, p. 160, does not apply

to conveyances of land. The reason for the distinction, he says, is manifest. "In the case of chattels, possession is *prima facie* evidence of ownership. But while possession of lands may be treated for some purposes, and is regarded as the lowest evidence of title, yet the public look not to the possession, but to the title deeds or proper records, to obtain proofs of title to such property." And again, at p. 212, he says, still more strongly, "the public look not so much to possession as to the public records, as proofs of the title to such property; the possession must, therefore, be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud." It is scarcely necessary to refer to the long list of cases with which he supports this statement of familiar law.

The terms of the deed in question, in this case, had been under consideration of the creditors of Kerrison & Leiding for nearly a year before its execution, and upon its execution it was at once duly recorded.

The cases of *Smith vs. Henry, 1 Hill 16*, and *Jacot vs. Corbett, Cheves, Ch. 71*, so much relied on by Stewart & Co. in this discussion, were cases of the assignments of personal property. In the first, the property consisted in slaves; and, in this second, of stock in trade and slaves, and so in the only other cases cited. *Hyslop vs. Clarke, 14 Johns., 458;* and *Austin vs. Bell, 20 Johns., 441*, goods and chattels were the subject of the assignments. But even in a case of personal property, this Court, in *Tompkins vs. Wheeler, 16 Peter, 106*, held, that leaving the property in the hands of the assignors, under the circumstances, did not affect the assignment.

Whether then this deed be regarded as an absolute assignment or as an assignment in the nature of a mortgage, the retention of the property in the possession of the grantors would not have invalidated the deed. But there is no evidence before this Court that there was any such retention of possession. Stewart & Co. in their answer to the Bill of Interpleader by Charles Kerrison, the assignee, it is true, say that Kerrison & Leiding, with the assent of Charles Kerrison, the Trustee, continued in the absolute enjoyment of the said real estate, collected the rents and profits, and applied the

same to their own use, and not to the payment of their debts. This allegation is not responsive to anything in the bill, and as the answer of one defendant, cannot be read in evidence against another. *Dan. Ch., Pl. and Pr. 2, 982.*

Nor is it true in fact. Not a dollar of the rents and profits of the property have been applied to the use of Kerrison & Leiding, or either of them.

We have met and answered then the objection to the deed on account of the retention of possession of the property.

b. Reservations in favor of the grantors.

There is no reservation on the face of this deed. There is a condition *implied*, that the estate shall result or be reconveyed to Kerrison & Leiding, if they paid the notes that it was given to secure. But in case they did not, the deed was absolute and without reservation, either express or implied. As Mr. Bump says, p. 436 the Court cannot look outside of the assignment to ascertain whether there will be a surplus or not. That would make the efficacy of the instrument depend on extrinsic circumstances, when the law requires that its intent shall be gathered from its face.

In the South Carolina case of *Jacot vs Corbett*, which seems to have inspired the attack upon this deed, the surplus of proceeds of sale of the stock in trade, and slaves, after paying forty cents on every dollar, was reserved to the assignors. But there is no reservation whatsoever in the deed we are considering.

But if there had been an express condition to recovery, it would not have vitiated the deed, for a residuary interest necessarily arises in every case where property is assigned to pay debts, the surplus by operation of law results in trust for the debtor, and an express reservation is a mere expression of that which the law would provide without such a declaration. *Bump, p. 405.*

c. Because it is a partial assignment, making preferences and requiring release.

The law certainly will not sustain a deed by which, as in *Jacot v. Corbett*, a debtor, giving but a part of his property to his creditors, requires of them a release in full of his debts;

but as Mr. Burrill says, (*p. 93*) there may be cases in which a debtor may find it expedient to provide for creditors by a partial assignment.

It is not denied that Kerrison & Leiding did have some other property not included in the deed, to wit: certain choses in action, with which the scheme of their settlement was that they were to resume business. But the mistake is to suppose that the creditors were required to release any thing but the disputed interest, by accepting the terms of the deed. We have alluded to this before. Let us repeat, no release is required by the term of the deed. Read the instrument carefully from end to end, and the word "release" is not found in it, except in the granting part, as a word of conveyance. But it is said that the two notes which they were to take in lieu and satisfaction of their debts, each for one half of the principal due, only bore interest from 1st June, 1865, that is, did not bear interest during the war. It is well known to the Court that the question whether debts between parties on the one side, and on the other of the late civil war, bore interest during the war, was one of the vexed questions that arose upon its close. But this Court has since decided that such debts did not bear interest during that time, *Brown vs. Hiatt, 15 Wallace, 177*, so that Stewart & Co. were not called upon to give up anything to which they were entitled in law. Indeed, as far as they are concerned, they submitted to the verdict upon which what they rely as a judgment in this case is based, which refused them this interest, as that to which they were not entitled. The verdict as first written and announced by the foreman was, "We find for the plaintiff interest on note and account till the war commenced, no interest during the war, and interest on note and account since the war." This verdict was afterwards corrected, by instruction of the Court, to an exact amount found by the Jury excluding the interest during the war. The judgment on this verdict was the foundation upon which the proceedings to set aside the deed were based, yet that judgment denied them the right to that, which Kerrison & Leiding's refusal to give, is made a ground for setting aside the deed. When Stewart & Co. acquiesced in the verdict at Greenville, de-

claring that they were not entitled to the interest during the war, they then and there abandoned the ground upon which they now object to the deed. They cannot complain, therefore that Kerrison & Leiding did not include in the notes which they offered to secure, an item to which they had no legal right.

Kerrison & Leiding made no preferences in the deed. They offered a security alike to all their creditors. They pressed Stewart & Co. to accept it; but Stewart & Co. sought a preference—the preference which, as Judge Willard says, is more often won by the hard-hearted and tricky adventurer than by diligence, seasoned with mercy. They do not now appeal to the bankrupt law, for in that the rule is that equality is equity. They claim the lion's share by reason of the strong arm of the law; but if in their haste to wield it, that arm falls paralyzed, is it not just, that the other creditors who have been content to share equally shall benefit by their mishap?

In a somewhat similar case, *Alton vs. Harison, Law Rep., IV. Clan. App., 626*, already cited, Sir G. M. Gifford, L. J., says: "If the appeal were to succeed the result would be that one creditor would be paid in full, and the other creditors entirely left out, which is exactly that which the appellants now complain of as unjust."

So in *Niolan vs. Douglass*, Chancellor Johnston says: "In some cases wherein the assignments of debtors have been set aside, the instant effect of the decision was to create an inequality among the creditors, and to give a preference to the creditor, whose ground of complaint was that all were not put on a footing. The Court, struck with the glaring inconsistency of this, with that equality at which it vainly aimed, has usually attempted to console itself and the suitors, and to cover over the contradiction, with the maxim *vigilantibus, noer dormientibus, leges sub serviunt.* But what is that, but to admit that the law allows the vigilant to be preferred? it is preference still." 2. Hill Chan., 450. See also Adams *vs.* Foster, 20 Johns, 451.

(*d*). *Because, as it said, the deed coerced them into an indulgence of two or three years.*

No general rule can be laid down upon the subject of provisions respecting the time for executing the trusts. Each case rests upon its own circumstance.

"It is difficult, indeed, impossible," observes Mr. Justice Clayton (in *Farmers' Bank vs. Douglass, 11 Smedes & Marsh, 469*), "to lay down any precise and definite rule applicable in all cases. In general no further time should be granted than the usual time of collecting debts by due course of law. Yet there may be circumstances in which it would not be fraudulent to stipulate for greater delay, as where the debts are very large, and where the personal exertions of the debtor are also relied on as one means of payment." *Burrill on Assignments, p. 190.*

In the case of *Dana vs. Bank U. S., 5 Watts & Sagt, 223*, a provision that the trust should be closed within two years, and if not then closed, that the assignee should, within six months, sell remaining assets sufficient to pay the debts preferred, was held no objection to the validity of the deed. And in the case of *Hardy vs. Skinner, 9 Iredell, 191*, a stipulation that a sale should not take place for three years, and that, in the meantime, the grantor should remain in possession of the property, was sustained.

Stewart & Co. commenced their suit before the execution of the deed, but they did not obtain judgment until August, 1868—two months after the first notes were to have been paid. Here the debts were large, and the personal exertions of the debtor were also relied on as means of payment. The indulgence was to enable them to resume business, and under the circumstances would surely not vitiate the deed.

Without, then, particular reference to the decisions of the State Courts, we think we have vindicated the deed from the objections which have been made to it. We have shown that it cannot be construed by the strict rules which govern an assignment, as that term is usually understood. That its true nature is that of a composition deed, by way of mortgage, and not obnoxious to the Statute of Elizabeth. It remains to show, as we have undertaken, that this deed was a good

and valid one, under the former decisions of the Courts of this State. This, the following review of the cases, will show:

1. *Smith vs. Henry, 1 Hil, (Law) 16.* This was a case of an assignment for the benefit of creditors, using that term in its usual *acceptation*, an assignment of personal property, and all that was held, we cannot say decided, for nothing new was determined, was that the law allows a debtor to give a preference to one creditor over another, but it will not allow him to secure an advantage to himself at the expense of creditors as the price of such indulgence.

2. *Vaughn vs. Evans, 1 Hill, (Chan) 414.* In this case an assignment with preferences was held valid. "The assignment," says Harper, J., "was only impugned in argument by supposing that it was intended to *coerce creditors*, by requiring them to release part of their demand before they could have the benefit of it. But this was plainly a misconception. The assignment is for the benefit of creditors who shall consent to accept (not accept and release) within a year, and this was proper that the trustee might know for what creditors he was to provide."

3. *Niolon vs. Douglass and others, 2 Hill (Chan.) 443.* This also was the case of an assignment of real and personal estate with preferences and requiring releases. In this case Chancellor Johnson says, that he is not aware of any decision which concludes anything on the point of releases, and that upon a careful examination of the cases, he had not found any wherein fraud was inferred merely from such requirement.

Upon the subject of reservation he says: "In the case put by the objection if after a full surrender by Johnson of all his effects, a trust had resulted to him, and had resulted merely in consequence of the non-acceptance of creditors, I apprehend this would not have vitiated the assignment. The authorities draw a distinction between a resulting and an express trust to the assignor, between cases where the debtor has reserved a control, and given himself a preference over the creditor and those in which he has surrendered all, in terms which give them a preference over him. If a trust result in the latter case, the remedy is to be let in to an account of the surplus in the trustees hands."

4. *Smith, Wright & Co. vs. C. C. Campbell & Co., Rice's Rep., 352.* In this case the objection to the deed was made more especially under an insolvent debtor's act of the State against undue preference, but Judge O'Neall, in delivering the opinion of the Court says, that to be within the objection, the preference must be *fraudulent*, that the intentional preference of one to another, so as to *altogether* defeat, delay, or hinder another creditor from being paid, presents all the ingredients which make out a fraud at either common law or under the statutes to prevent fraudulent conveyances, and it was held that an assignment for the benefit of creditors generally, though upon trusts, preferring in the order of payment some creditors to others, could not, on the face of the deed, be considered as made to *defeat, delay*, or *hinder* the creditor of the assignor, though not among the preferred creditors.

5. *Jacots vs. Corbett, Cheves Chan.* 71. This case, so much relied upon by Stewart & Co., was the case of the assignment of personalty by a debtor for benefit of such creditors as should accept a rateable proportion, but not to exceed forty per cent of their claims, the surplus, if any, to be returned to the debtor. Held, under *all the circumstances*, void under Stat. 13, Eliz.

But in this case, Chancellor Dunkin declares that "the general right of a debtor to make a preference among his creditors is not questioned." That "he may prescribe the order they shall be paid. I think, too, he may prescribe the condition of a release." He held the deed void under its peculiar circumstances.

The Appeal Court consisted of four Chancellors; and upon appeal, Chancellor Harper concurred with Chancellor Dunkin. Chancellor Johnson concurred "in the result, but not without hesitation," and Chancellor Johnson was "not prepared to concur entirely in the judgment."

6 Le Prince & Guiltemot, 1 Rich. Eq., 187. The assignment in this case was held void on account of the concealment of extra territorial property. But the Court is careful to declare.

"The ground is not that it gave a preference. *Vaughn vs. Evans*, 1 *Hill Ch.*, and innumerable other cases show that preferences, fairly given, are allowable. Nor is the exaction of a release for any unsatisfied balance. *Nolan vs Douglass*, 2 *Hill Ch.*, 443,

a case decided almost unanimously by both benches, and to the entire satisfaction, so far as I know, of the profession, is authority for such an exaction, when made under fair circumstances."

7 *Tennant vs. Stoney, 1 Rich. Eq., 222.* This case, which was elaborately discussed, and carefully considered, the report of it occupying forty pages of the volume in which it is contained, was the direct precedent for the deed in question. In this case the debtor, on the 16th of June, 1837, executed a bond to trustees for the payment of his creditors named in a schedule annexed, the sums opposite their names, on or before the 16th of June, 1841, reciting that the creditors had *agreed* to receive the principal of their debts with interest as therein expressed, *which was less than the legal rates*, six instead of seven per cent., and to secure this bond, mortgaged to the trustees certain plantations and negroes. Chancellor Johnston, delivering the opinion of the Court, says:

"His general creditors can raise no objections to this. To the validity and original operation of the instruments, as I have said, they can object only on the score of fraud; and there is no fraud here. The character of the transaction has been somewhat misapprehended in this argument. *It does not purport to have been a general assignment or composition, but merely a security given to certain creditors, limited to certain portions of the debtor's estate*, upon terms advantageous to him, and not otherwise disadvantageous to his general creditors, than as all liens and special securities must necessarily be, and to regard such arrangements as obnoxious to the stigma of fraud must, as I think is satisfactorily argued in our own case, (*Niolan vs Douglass*, 2 *Hill Ch*, 443,) cut up all securities, and destroy that freedom which is essential to commerce."

Stewart & Co. objected to the deed of Kerrison & Leiding, because they remained in possession of a part of the property. Mr. Stoney, in the last case, executed the mortgage in June, 1837, and died in possession, in November, 1838, and there is no doubt, had he lived, would have remained in possession the full terms of the four years the creditors had allowed him for the payment of the debts.

They object to it on account of reservation in favor of the grantors; but in *Niolan vs. Douglass*, the Courts of South Carolina have declared that the trusts which result, and are not reserved to the debtor, do not vitiate the deed. The case of *Jacot vs. Corbett* was obnoxious, because *all over 40 per cent.* of the proceeds of the assigned property was reserved to the

grantor. None of the assigned property was reserved to Kerrison & Leiding.

They object to it, because it is a partial assignment. The mortgage in *Tennant vs. Stoney*, was a partial assignment to the same extent, and that was maintained by the Courts of the State. They object to it, because they say it made preference. It did not; but if it did, its doing so was justified by the State decisions in *Smith vs. Henry*, *Niolan vs. Douglass*, *Smith & Wright vs. Campbell*, *Jacot vs. Corbett*, *LePrince vs. Guillemot*, and *Tennant vs. Stoney*. They object to it, because it requires a release. It did not, as was explained in *Vaughan vs. Evans;* but if it had, it was not, therefore, invalid, as held in *Niolan vs. Douglass*, *Jacot vs. Corbett*, and *LePrince vs. Guillemot.*

They object to it, because they say the deed coerced them into an indulgence of two or three years; but in *Vaughan vs. Evans*, our Courts say, the offer of the opportunity to accept of an assignment for their benefit is no coercion upon creditors: that they are at liberty to refuse or accept. The indulgence of four years in *Tennant vs. Stoney* was not held an objection to the validity of the deed.

We think we have conclusively shown that there is nothing to prevent this Court from construing the deed in question for itself by the rule of the common law, and that tried by that rule it must stand. That the true nature of the instrument is that of a mortgage, by which Kerrison & Leiding, upon consultation with their creditors, obtained time for the payment of what they owed. That the instrument is more of a composition deed than an assignment, as that term is generally understood. But that if it were an assignment, no case cited by Stewart & Co. applies to this deed, because the cases relied on were all of assignments of personalty and not of real estate. That the objections made in Stewart & Co.'s answer, are each and all met by numerous decisions of the Courts of this State, as well as of other Courts. That until the ruling upon this deed, an unbroken current of decisions in the Courts of the State had declared such a deed good and valid in law. This Court will surely then sustain an instrument executed in good faith upon open treaty with the cred-

itors, in accordance with the settled rule of the State Courts as it then stood, rather than set it aside in compliance with a novel decision, in the reasons for which the members of the Court themselves do not concur.

Summary.

In conclusion, we submit that the appellants have shown—

1. That none of them, not even Paton & Co., or Hutton were parties to, or in any way bound by the proceedings in the State Court, in which the deed in question was construed and declared invalid.

2. That not being bound in any way by those proceedings, they are free now to question the alleged judgment which Stewart & Co., set up in derogation of their rights and interests, and that being strangers to it, and having, therefore, no right to writ of error or appeal that they may attack it collaterally.

3. That having the right thus to question the alleged judgment, they have examined it, and found it to be no record of a Court, but composed of parts of a record in two distinct Courts, resting upon the authority of neither, and in fact a mere nullity.

4. That not being bound by the proceedings in the State Court, and free to set up the deed made by Kerrison & Leiding to secure their debts, they have shown that deed, as tried by the settled law in the State of South Carolina at the time of its execution, a valid and subsisting lien upon the property mentioned in it; that it is not obnoxious to the statute of Elizabeth, and they ask that this Court will declare the instrument, as it was intended to be, a security for their claims.

Edward McCrady Jun

AN ENQUIRY

INTO THE SUBJECT OF

THE TERRITORIAL LIMITS AND JURISDICTION

OF THE

Circuit and District Courts

OF THE

UNITED STATES,

IN

STATES DIVIDED INTO DISTRICTS.

CHARLESTON:
WALKER, EVANS & COGSWELL, PRINTERS,
Nos. 3 Broad and 109 East Bay Streets,
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The questions which have recently arisen in regard to the jurisdiction of the United States Circuit Court for the Eastern District of South Carolina, and the District Court for the Western District, (having Circuit Court powers) though embarrassed with us, by other questions, viz: of practice; are not confined to the United States Courts for this State, but as Mr. Conkling suggests in his treatise, arise in regard to similar Courts in several other States. The following enquiry into the history of these Courts is submitted to the profession to assist in solving the doubts that have been suggested in regard to them.

EDWARD McCRADY, JUNR.

Charleston, October, 1873.

Prior to the year 1856, the United States Courts for the State of South Carolina were held only in Charleston and Columbia, but upon the elevation of the Hon. A. G. Magrath to the Federal Bench, a court was held under an Act of Congress of that year, at Greenville. This Court, during the four years preceding the war, and since its re-opening after the war, has been generally regarded by the profession in the State, as the same as the Courts which sit in Charleston and Columbia, and writs tested in Charleston have been drawn returnable in Greenville, and writs tested in Greenville returnable in Columbia, and those tested in Columbia returnable again in Charleston; the declarations, &c., following the writs from place to place, and the records of the three Courts kept as one.

As this practice has been seriously questioned of late, and as the subject is of general interest to the profession throughout the State, it may not be unprofitable to review the legislation and judicial decisions in relation thereto—to look into the history of the matter, and thus the better to be able to understand the questions which have arisen.

By the constitution, the judicial power of the United States is vested in one Supreme Court, and in such "inferior courts" as Congress may from time to time ordain and establish. In pursuance of this power Congress at it first session (1789, 1 Stat., 73) passed the statute commonly known as the "Judiciary Act," the organic law of the United States Courts.

By this Act the United States were divided into thirteen districts (§ 2.) But these districts it must be remembered were not coincident with the thirteen original States, as they are called; the States of Rhode Island and North Carolina not yet having adopted the Constitution. These districts were "to be limited and called" as therein provided, and the first was "to consist of

that part of the State of Massachusetts which lies easterly of the State of New Hampshire, to be called Maine District;" another was "to consist of the State of Virginia, *except that part* called the District of Kentucky, and to be called Virginia District;" another to consist of the *remaining part* of the State of Virginia, to be called Kentucky District," and another, that with which we are immediately concerned, "to consist of the State of South Carolina, and *to be called South Carolina District.*" The Act then goes on (§ 3) to provide "that "there be a Court called a District Court in each of the afore-"mentioned districts, to consist of one Judge, who shall reside "in the district for which he is appointed, and shall be called a "District Judge," fixes the times and places of holding the Courts, and provides: "that in the Districts that have but "one place for holding the District Court, the records thereof "shall be kept at that place, and in Districts that have two at "that place in each District which the Judge shall appoint."

The next section (§ 4) provides, "that the before-mentioned districts, except those of Maine and Kentucky, shall be divided into three Circuits, and be called the Eastern, the Middle and the Southern Circuit;" the Southern Circuit to consist of the districts of South Carolina and Georgia, and that there shall "be held annually in each district of said Circuits two courts, "which shall be called Circuit Courts, and which shall con-"sist of any two Justices of the Supreme Court, and the district "Judge of such districts, any two of whom shall constitute "a quorum." This section also provides for the times and places of holding these Circuit Courts. The first session, in South Carolina, to be held on the 18th May next thereafter, and the next, on the 17th October, and alternately at Columbia and Charleston.

The ninth section of this act prescribes the jurisdiction of the District Courts, and the tenth makes special provision for the District Courts of Kentucky and Maine. As these courts present in the very inception of the system the "anomalies" as they have been called, and which are so much complained of, we will quote the section in full:

"§10. That the District Courts in Kentucky District shall besides the "jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals "and writs of error, hereinafter made cognizable in a Circuit Court, and "shall proceed therein in the same manner as a Circuit Court; and writs of "error and appeals shall lie from decisions therein to the Supreme Court in "the same causes as from a Circuit Court to the Supreme Court, and under "the same regulation. And the District Court in Maine District shall besides "the jurisdiction hereinbefore granted have jurisdiction of all causes except "of appeals and writs of error hereinafter made cognizable in a Circuit "Court, and shall proceed therein in the same manner as a Circuit Court. "And writs of error shall lie from decisions therein to the Circuit Court in "the District of Massachusetts in the same manner as from other District "Courts to their respective Circuit Courts."

The eleventh section goes on to prescribe the jurisdiction of the Circuit Courts, and among other things, provides: "But "no person shall be arrested in one District for trial in "another in any civil action before a Circuit or District Court. "And no civil suit shall be brought before either of said courts "against an inhabitant of the United States by any original "process in any other district than that whereof he is an inhabi- "tant, or in which he shall be found at the time of serving the "writ," &c.

The State of North Carolina having ratified the Constitution November 21, 1789, (1 Stat., 126,) Congress, by an Act, June 4, 1790, gave effect to the Judiciary Act of 1789 in that State, erecting it into a District, to be called North Carolina District, establishing a District Court, and annexing it to the Southern Circuit. And Rhode Island having ratified the Constitution May 29, 1790, a similar Act to give effect to the Judiciary Act was passed by Congress 23d June, 1790, (1 Stat. 128,) by which Rhode Island District was annexed to the Eastern Circuit. Vermont, having been admitted in 1791, an Act was passed on the 2d March of that year, giving effect to the laws of the United States, establishing a District Court, and annexing it to the Eastern Circuit. (1 Stat., 197.)

The first instance we have of the division of a State into Districts within its own limits is that of North Carolina, in 1794; (1 Stat., 396). By an Act of that year—that State was divided into three Districts. The Act was soon repealed—

1797—(1 Stat., 518); but there is a provision in it which it is as well in this connection not to overlook. It is as follows:

"§4. That any person living within either of the Districts "aforesaid who hereafter shall be arrested by virtue of process "issuing out of the Court of either of the said Districts other "than that in which he shall so reside, shall be discharged "therefrom on his entering his appearance and giving bail "to the action in the Court of the District in which he shall "so reside, in like manner and to the like effect as if the said "process had originally been issued out of the Court within the "said last mentioned District."

The State of Tennessee was admitted 1st June, 1796, and on the 31st January, 1797, (1 Stat., 496,) an Act was adopted, giving effect to the laws of the United States within the State; and among other things providing: "§2. That the said State shall "be one District, to be denominated Tennessee District, and "there shall be a District Court therein, to consist of one Judge, "who shall reside in the said District, and be called a District "Judge. * * * * * * And the said Judge shall, in "all things, have and exercise the same jurisdiction and powers "which by law are given to the Judge of the District of Ken-"tucky."

"An Act to provide for the more convenient organization of the Courts of the United States," was passed 13th February, 1801, (2 Stat., 89,) by which the United States was re-arranged into districts and circuits, several States being divided into two districts. This Act provided for the appointment of Circuit Judges as distinct and separate officers, and by it the Circuit Court powers and jurisdiction were taken away from such District Courts as then possessed them, special provision being made by the twentieth section for continuing over the causes then pending in these Courts to the respective Circuit Courts.

This Act was but short lived, having been repealed the following year, (2 Stat., 132,) whereby the Courts respectively were remitted to their condition before its passage. We may observe in passing that this Act of 1801 also contained the provision that no person should be arrested in one district for

trial in another, and that no civil action should be brought by original process against any person in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

That the repeal of this Act revived the jurisdiction of the Courts of Kentucky and Maine is clear, not only from the general rule of construction, that by the repeal of a repealing statute the original statute is revived, (Dwarris on Statutes, p. 534,) but from the subsequent legislation of Congress.

A second Act (2 Stat., 156) was passed in the year 1802 in relation to the subject, entitled "an Act to amend the judicial system of the United States," by which the United States was again re-arranged into circuits, "excepting the Districts of Maine, Kentucky and Tennessee."

The State of Ohio was admitted in 1803, and the laws of the United States extended to it by an Act of that year, (2 Stat. 201,) by which Act it was provided that the State should constitute one District, to be called the Ohio District, and that a District Court should be held therein, to consist of one Judge, who should "in all things have and exercise the same jurisdiction and powers, which are by law given to the Judge of the Kentucky District." No provision for appeal was made by this Act. In 1804 a District Court was established in the Territory of Louisiana, (2 Stat. 283,) to consist of one Judge, who should have and exercise the same jurisdiction and powers which are by law given to, or may be exercised by the Judge of Kentucky District. In 1805, an Act (2 Stat. 338) was passed providing that certain territorial Courts should "have and exercise within their respective territories the same jurisdiction and powers which are by law given to, or may be exercised by the District Court of Kentucky District, and writs of error and appeal shall lie from decisions therein to the Supreme Court, for the same causes and under the same regulation, as from the said District Court of Kentucky District."

But not only did Congress thus several times allude to the special jurisdiction of the District Court of Kentucky as still existing, but when it came to establish another circuit to include,

these States of Kentucky, Tennessee and Ohio, in 1807, by express enactment (2 Stat. 420) repeals the powers, authority and jurisdiction of the Circuit Courts of the United States previously vested in the District Courts of those States.

In 1812, the State of Louisiana was admitted into the Union and the laws of the United States extended to it. By the act of admission (2 Stat. 701,) the State with the residue of that portion of country which was comprehended within the territory of Orleans, was constituted one judicial district, with a District Judge, who should "have and exercise the same jurisdiction and powers which," * * * were given to the District Judge of the territory of Orleans." No provision for appeals is made by the Act.

In 1812, an additional District Judge was provided for the District of New York, (2 Stat. 719,) the Judges allotting themselves as they saw fit for the purpose of holding separately the Courts, and in 1814 another Act entitled "An Act for the better organization of the Courts of the United States within the State of New York," (3 Stat. 120,) was passed, by which the State was divided into two Judicial Districts, one to be called the Southern District of New York, and the other to be called the Northern District of New York. The last section of this Act is as follows:

"§ 3. That the Circuit Court of the United States shall be held in and for "the said Southern District of New York, at the city of New York, at the "time and in the manner now directed by law to be held in and for the Dis- "trict of New York, and that the District Court in the said Northern Dis- "trict of New York shall beside the ordinary jurisdiction of a District Court "have jurisdiction of all causes except of appeals and writs of error, cog- "nizable by law in a Circuit Court, and shall proceed therein in the same "manner as a Circuit Court, and writs of error shall lie from decisions "therein to the Circuit Court in the said Southern District of New York, "in the same manner as from other District Courts to their respective "Circuit Courts."

In 1815, a supplemental Act provided for the appointment of a Marshal for the Northern District of New York, (3 Stat. 235;) and in 1818, another provided for the transfer of the records of the causes belonging to the Northern District to the

Clerk of the Court for that District, (3 Stat. 413.) The last clause of this Act of 1818 is significant. It is as follows:

"§6. That the original jurisdiction of the Circuit Court of the Southern "District of New York shall be confined to causes arising within said Dis- "trict, and shall not be *construed* to extend to causes of action arising within "the Northern District of New York."

In the same year, (1818,) Pennsylvania was divided into two Judicial Districts, to be called respectively the Eastern District, and the Western District, and provision made for the appointment of an additional Judge for the Western District, the District Judge then holding office being assigned by the Act to the Eastern District, (3 Stat. 462.) By this Act provision is made in the same words for the larger jurisdiction of the Western District Court, viz:

"§4. That the Circuit Court of the United States shall be held for the "Eastern District of Pennsylvania, at the city of Philadelphia, at the times "and in the manner now directed by law to be held for the District of Penn- "sylvania, and the District Court for the said Western District, in addition to "the ordinary jurisdiction and powers of a District Court, shall, within the "limits of the said Western District, have jurisdiction of all causes, except of "appeals and writs of error cognizable by law in a Circuit Court, and shall "proceed therein in the same manner as a Circuit Court, and writs of error "shall lie from decisions therein to the Circuit Court in the said Eastern "District of Pennsylvania, in the same manner as from other District Courts "to their respective Circuit Courts."

The next year, (1819,) a certain portion of Virginia was cut off and erected into a Judicial District, with circuit jurisdiction conferred in the same language, appeals to lie directly to the Supreme Court. (3 Stat., 478.) The State of Illinois was admitted, the laws of the United States extended to it, and the State constituted a Judicial District, whose Judge should "in all things have and exercise the same jurisdiction and powers which were by law given to the Judge of the Kentucky District," &c. (3 Stat., 502.)

The next legislation (1820) upon the subject was "An Act establishing a Circuit Court within, and for the District of Maine," which added that District to the First Circuit. (3

Stat., 554); but Congress did not consider that sufficient to take away the extra jurisdiction the District Court had formerly exercised, but especially provided: "§2. That all Acts and parts of Acts granting said District Court of Maine the powers and jurisdiction of a Circuit Court of the United States be, and the same are hereby repealed."

In this year, 1820, Alabama was admitted, the laws of the United States extended to it, and the State constituted a district with a Judge having "in all things the same jurisdiction and powers which were by law given to the Judge of the Kentucky District" (3 Stat., 564).

The appeals from the District Court of the Western District of Pennsylvania, by the Act of 1818, we have just seen were given to the Circuit Court for the Eastern District of that State, but, by the Act of 1820, this was altered and appeals given directly from the District Court of the Western District to the Supreme Court of the United States. (3 Stat., 598.)

In 1822, Missouri was admitted, created a Judicial District, with a Judge to whom was given "the same jurisdiction and powers which were by law given to the Judge of the Kentucky District," but no provision was made in regard to appeals. (3 Stat., 653.)

In the case of the State of Tennessee a special provision was made by the Act of this year, that where suit was brought against two or more citizens of the State of Tennessee, some of whom reside in East and some in West Tennessee, the Clerk of the Circuit Court in which the plaintiff might elect to sue might issue duplicate writs, one directed to the Marshal of East, and the other to the Marshal of West Tennessee, each of whom were to execute and return the writs, and when returned to be docketted and proceeded in to judgment as one case only. (3 Stat., 661.) This Act is important as the forerunner of a similar general provision.

This was the state of the statute law upon the subject, when in 1823, an act was passed entitled "*An Act to divide the State of South Carolina into two judicial districts.*" (3 Stat., 726.) Prior to this act we find but one judicial decision of the Supreme

Court in any way touching the jurisdiction of these courts, and that is the case of *Turner v. The Bank of North America, 4 Dallas p. 8,* (1799.) The case arose upon the description of the assignors of a promissory note, in the declaration, in which they were described, not as citizens of North Carolina, but as "using trade and merchandise in partnership together at Philadelphia or North Carolina." Elsworth, Chief Justice, in delivering the opinion of the court says:

"A Circuit Court though an inferior in the language of the Constitution "is not so in the language of the common law, nor are its proceedings sub- "ject to the scrutiny of those narrow rules which the caution or jealousy "of the Courts of Westminster, long applied to Courts of that denomi- "nation, but are entitled to as liberal intendments or presumptions in "favour of their regularity as those of any Supreme Court. A Circuit Court, "however, is of *limited jurisdiction,* and has cognizance, not of cases generally, "but of a few specially circumstanced amounting to a small proportion of the "cases which an unlimited jurisdiction would embrace. And the fair pre- "sumption is (not as with regard to a court of general jurisdiction that a "cause is within its jurisdiction, unless the contrary appears, but rather) "that a cause is without its jurisdiction till the contrary appears."

The law standing thus at that time, statutory and judicial, the act act of 1823 was passed in these words:

"§ 1. *Be it enacted, &c.* That the State of South Carolina be and the same "is hereby divided into two Districts in the manner following, that is to say: "the Districts of Lancaster, Chester, York, Union, Spartanburg, Greenville, "Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield, shall "compose one District, *to be called the Western District,* and the residue of the "State shall form one other District *to be called the Eastern District.* And "the terms of the said District Court for the Eastern District, shall be held "in Charleston at such times as they are now by law directed to be holden. "And for the trial of all such civil and criminal causes as are by law cogni- "zable in the District Courts of the United States, which may hereafter arise "or be prosecuted, or sued within the said Western District; there shall be "one annual session of the said District Court holden at Laurens Courthouse, "to begin on the second Monday in May, in each year, to be holden by "the District Judge of the United States of the State of South Carolina, and "he is hereby authorized and directed to hold such other special sessions as "may be necessary for the despatch of the causes in the said Court, at such "time or times, as he may deem expedient, and may adjourn such special "sessions to any other time previous to a stated session."

This Act it will be observed, while it divided the State into two Judicial Districts, and directed the times and places for the holding of the District Courts in each; the District Courts for the Western District to be held at Laurens, on the second Monday in May, and the District Court for the Eastern District at such times as then provided by law, makes no provision whatever for any alteration in regard to the Circuit Court, that it neither added nor included these subdivided Districts into the then existing Sixth Circuit, (Act 1802) as had been done in the cases of North Carolina and Rhode Island, in 1790, (the former having been included in the Southern and the latter in the Eastern Circuit,) Vermont in 1791, (annexed to the Eastern Circuit;) nor providing a special Circuit Jurisdiction for the District Court, as in the case of Maine and Kentucky, (1789,) Tennessee, (1797,) Ohio, (1803,) Louisiana, (1812,) Northern District New York, (1814,) Western District of Pennsylvania, (1818,) Illinois, (1819,) and of Missouri (1822.) But neither did it any way repeal the Act of 1802, by which Circuit Courts were to be held at Charleston and Columbia, the result of which would seem to have been that the Circuit Court of the sixth Circuit retained its jurisdiction in the Eastern District, a place and time for its sitting having been provided by an unrepealed law. But the Circuit Court could not sit in the Western District for neither time nor place had been fixed by law, nor indeed was there any statute in terms authorizing the exercise of its jurisdiction within that District.

The Act of 1823, was defective also in other particulars, and among them it was deficient of any provision for the drawing of juries: It is said that Judge Lee, then the District Judge, once went to Laurens, but being unable to obtain a jury did not go there again, and so the law in regard to South Carolina remained until the Act of 1856, which we must notice presently.

But in the meantime it is as well to follow as far as we may in the limit of these pages, the legislation of Congress from 1823 to 1856. The States of Arkansas, (1836, 5 Stat. 50,) Michigan, (1837, 5 Stat. 61,) Florida, (1845, 5 Stat. 788,) Texas, (1845, 9 Stat. 11,) and Iowa, (1846, 9 Stat. 117.) Wisconsin, (1848, 9 Stat. 57,) were admitted during that time, and to each

the laws of the United States extended, and in each a District Court established, the Judge of which should have and exercise the same jurisdiction and power which were by law given to the Judge of the Kentucky District. By Act of 1831, (4 Stat. 444,) in a single enactment Circuit Court powers were also given in the language of the Act of 1789 to the District Courts of the Northern District of New York; the Western District of Pennsylvania; the District of Indiana; the District of Illinois; the District of Missouri; the District of Mississippi; the Western District of Louisiana; the Northern District of Alabama, and the Southern District of Alabama.

During this period several changes had been made in the organization of the Circuit Courts.

In 1837 an Act was passed re-arranging the circuits, but which did not alter the sixth circuit, re-enacting that the "Districts of South Carolina and Georgia shall constitute the sixth circuit." (5 Stat., 176.) This Act repeals the power and jurisdiction previously vested, as we have just seen in the District Courts of Indiana, Illinois, Missouri, Arkansas, the Eastern District of Louisiana, the District of Mississippi, the Northern District of New York, the Western District of Virginia, and the Western District of Pennsylvania, and the Districts of Alabama, but it did not repeal the powers and jurisdiction of a Circuit Court, then vested in the District Court of the Western District of Louisiana; on the contrary, it provides for the continuance of these powers, directing appeals in the future to be to the Circuit Court in the other District in said State, *instead* of to the Supreme Court as previously provided. Another Act was passed in 1842, altering the constitution of some of the circuits, and among them the sixth, which by it thereafter was composed of the Districts of North Carolina, South Carolina and Georgia. (5 Stat., 507.)

During this time, an Act had been passed and two cases had reached the Supreme Court, which should be particularly noticed. The Act of 1826, (4 Stat. 184,) provided:

"That all writs of execution upon any judgment or decree, obtained in "any of the District or Circuit Courts of the United States, in any one "State, which shall have been or may hereafter be divided into two judicial

"districts, may run and be executed in any part of such State, but shall be "issued from and made returnable to the court, where the judgment was ob- "tained, any law to the contrary notwithstanding."

The first case was that of *McMicken vs. Webb, 11 Peters 25*, in which Justice Thompson in delivering the opinion of the Court says:

"The question presented by the first plea to the jurisdiction of the court is whether Webb, a citizen of the State of Louisiana, who resided in the Western District of that State could be sued by a plaintiff, who was a citizen of the State of Ohio, in the District Court of the Eastern District of the State of Louisiana. The residence of Webb being in the Western District of Louisiana, could not effect the jurisdiction of the Court. The plea admits that he was a citizen of Louisiana, and the Act of Congress gives jurisdiction where the suit is between the citizen of the State where the suit is brought, and the citizen of another State; and the division of a State into two or more Districts, cannot affect the jurisdiction of the Court, on account of citizenship. This plea admits that the petition and citation, were served upon him in New Orleans, which takes the case out of the prohibition in the Judiciary Act: that no civil suit, shall be brought in the Courts of the United States, against an inhabitant of the United States by any original process in any other District, than that whereof he is an inhabitant, *or in which he shall be found at the time of serving the writ.*"

Another case of importance, that of *Toland vs. Sprague, 12 Peters* 300, came before the Supreme Court, in 1838, in which that Court gave construction to the 11th section of the Judiciary Act of 1789, in relation to those who are *not inhabitants*, and *not found* in the district.

Mr. Justice Barbour delivered the opinion of the Court at great length, and in it he says:

"The Judiciary Act has divided the United States into judicial districts. Within these Districts a circuit is required to be holden. The Circuit Court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of its jurisdiction over the subject-matter of suits in respect to person and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any State of the Union. It has not done so. It has not, in terms, authorized any original civil process to run into any other district, with the single exception of subpœnas for witnesses within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which judgment was rendered; one in favor of

private persons in another district of the same State, and the other in favor of the United States, in any part of the United States. We think that the opinion of the Legislature is thus manifested to be, that the process of a Circuit Court cannot be served without the district in which it is established, without the special authority of law therefor."

See also, to the same effect, the case of *ex parte Peter Graham, 4 Wash. C. C. Rep., 211,* and so in *Sheldon, et al., vs. Sill, 8 How: 441,* it was said that courts created by statute can have no jurisdiction, but such as the statute confers.

Congress, it will thus be seen, in pursuance of its powers under the Constitution, proceeded to devise a judiciary system, and in doing so, after providing for the Supreme Court as required by the Constitution, erected the District Courts as "Inferior Courts," under (but only under) the terms of that instrument. The jurisdiction, powers and officers of these courts it prescribes, and makes them *sui juris*, and self-existing. The Supreme Court, under the Constitution, except in a few specified cases, is appellate only in its jurisdiction. The District Courts provided by the Constitution were courts of the largest admiralty and maritime jurisdiction, and of limited civil and criminal jurisdiction. It will be recollected, that the judicial power of the United States extends to controversies between a State and citizens of another State, and between citizens of different States. The object of this provision, it is evident, was to interpose between the States and citizens of other States, and between citizens of different States, an impartial tribunal, one beyond the influence of State prejudices; but the District Court, as provided in the scheme of Congress, is to consist of one Judge, who shall reside in the District for which he is appointed, (Act, 1789,) and the jurors to be drawn from the citizens of the State in which the Court sits. (§29, Ibid.) This Court thus constituted, Congress did not seem to regard as sufficiently beyond local influences, to be entrusted by itself with the protection of the rights of citizens of different States, nor did it see fit to entrust it with jurisdiction of high crimes. Intermediary, therefore, between this Court and the Supreme Court, it provided a Circuit Court, having no officers of its own, but constituted by a Judge

of the District Court for which District it should sit, together with, by the Act, (1789,) any *two* Justices of the Supreme Court, and by a subsequent Act, (1802,) by the District Judge, and the Justice of the Supreme Court residing within the Circuit for which the Court is holden, except in the Second and Fifth Circuits, for which special provision was made.

The Circuit Courts, it will thus be seen, were dependent upon the District Courts, both for their limits and constitution, and for their officers. Their composition is derived both from the Supreme and District Courts, and is independent of neither. We do not forget the Act of 1801, giving the Circuit Court powers, jurisdiction and Constitution, *sui juris;* but as that Act was never practically in operation, and was so soon repealed, it can scarcely be considered as affecting the question. Of the late Act of 1869, we shall speak hereafter. At present we are considering the law as it stood in 1856. From the very inception of the system, Congress found itself called upon to provide for Districts to which it was inconvenient to extend the Circuit Courts, and special provision was at once made for the Districts of Maine and Kentucky, and this provision was; to give to the District Courts in these Districts, circuit court powers, with appeal from one to the adjoining Circuit; and from the other, directly to the Supreme Court.

This provision was convenient, not only in extending the laws to newly admitted States—to Tennessee, Ohio, Louisiana, Illinois and Missouri—but also in providing for new Districts, required by the increasing population, as in the instance of the Northern District of New York, and the Western District of Pennsylvania, and it thus, from the origin of the judiciary system, and continuously after, has formed a part of it, and is not an anomaly, as it has been termed.

The condition of the United States Courts in South Carolina, from 1824 to 1856, certainly was anomalous, for the State had been divided into two Districts, which districts were specifically designated by name, but no change had been made in regard to the Circuit Court, for sessions of which the Act of 1802, then still in force, provided, at Charleston and Columbia, both of

which cities are situated in the Eastern District; but no provision was made for the sitting of the Circuit Court in the Western District. The Circuit Court of the United States thus had a location and jurisdiction in what became under the division, in 1823, the Eastern District; and its jurisdiction once obtained could only be taken away by express enactment.*

But the Circuit Court had had no such location in the Western District. It could only sit in such place as Congress directed; and as we have seen, it had been seriously questioned whether a citizen of one District could be held to answer in another District of the same State, even though found in the District of which he was not an inhabitant. (*McMicken v. Webb*, ante p. 13;) and it had been expressly held that the Circuit Court for each District sits within and for that district, and is bounded by its local limits; and that "whatever may be the extent of its jurisdiction over the subject matter of suits in respect of persons and property, it can only be exercised within the limits of the district." (*Toland v. Sprague*, ante p. 13.)

In 1837, another re-arrangement of the Districts of the United States into Circuits was made, but in regard to this State the Act merely declared that "the Districts of South Carolina and Georgia shall constitute the Sixth Circuit," and did not provide for a session of the Circuit Court for the Western District of the State of South Carolina. (5 Stat., 176.)

The State of Arkansas had been admitted in 1836, created a "district" and a Judge provided with the powers and jurisdiction which were by law given to the Judge of the Kentucky

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Dwarris on Statutes, p. 612, quoting *Ashurst, J., 4 Term R, 109*. "Where the superior Courts have jurisdiction it can only be taken from them by the express words of an Act of Parliament, or by necessary implication;" And we must recollect that the Circuits are superior Courts in the sense of the common law; "inferior" only to the Supreme Court as the term is used in the constitution. *Turner v. The Bank of North America*, ante p. 10. Dwarris also refers to the opinion of Tindal, C. J., 8 Bingham, 394, to which we shall have occasion presently to refer.

But directly in point is the decision of the Supreme Court, in the case of *The United States v. Dawson, 15 Howard, 467, post*, in which it was held in regard to the State of Arkansas, that the Circuit Court under similar legislation retained its jurisdiction over the diminished territory.

District. In 1844, this Court was invested with jurisdiction over the Indian Territory adjoining, and in 1851, Arkansas and the Indian Territory were divided into two districts, certain counties of the State and the Indian Territory lying within the then present judicial district of Arkansas, were constituted a new judicial district to be styled the Western District of Arkansas, the residue of the State to remain a judicial district, to be styled the Eastern District of Arkansas. This Act dividing Arkansas into judicial districts (9 Stat., 594) is very similar to that dividing the State of South Carolina. It divides the State into two districts—directs that the Judge of the District Court of Arkansas shall hold certain terms of said (that is Western) Court, but does not provide for the drawing of juries or for terms of the circuit in either district. It, however, unlike our Act of 1824, at once gave, as was afterwards done in our Act of 1856, the Circuit Court powers to the new District Court, and it also provided what was done by neither of our Acts for the appointment of a District Attorney and Marshal for the Western District.

It so happened that at the time of the passage of this Act dividing the State of Arkansas into two districts, there were certain prisoners under indictment in the Circuit Court, for the "District of Arkansas" for murder committed in that portion of the former District then constituting the Western District. The Circuit Court for the Eastern District, however, retaining the records of the Circuit, for the former "District of Arkansas" proceeded with the trial of the prisoners, whereupon a motion was made to quash the indictment for want of jurisdiction, inasmuch as it appeared that the crime was committed in what had since become another district, and that the defendant could under the 6th Amendment to the Constitution only be tried "by an impartial jury of the State and District "wherein the crime shall have been committed, which District "shall have been previously ascertained by law." But the Supreme Court held that the Court for the Eastern District had rightly acquired jurisdiction, and that having done so the change

in the Districts did not take away jurisdiction of the cases pending before it. United States *v.* Dawson, 15 How., 467.

Mr. Justice Nelson delivered the opinion of the Court, and in it he says, p. 486:

"It will be seen on a careful perusal of this Act, that it simply erects a "new Judicial District out of nine of the Western Counties in the State, to- "gether with the Indian Country, and confers on the District Judge besides "the jurisdiction already possessed, Circuit Court powers within the District, "subject to the limitation as to appeals and writs of error, leaving the "powers and jurisdiction of the Circuit and District Courts as they existed "in the remaining portion of the State untouched. These remain and con- "tinue within the District after the change the same as before, the only ef- "fect being to restrict the Territory over which the jurisdiction extends. "Hence no provision is made as to the time or place of holding the Circuit "or District Courts in the District or in respect to the officers of the "Courts, such as District Attorney, Marshal or Clerk, or for organizing "the Courts for the dispatch of their business. These are all provided "for under the old organization."

The point decided by the Court, it will be observed, was that the Circuit for the Eastern District, having once *obtained* jurisdiction, it was not ousted by the diminution of its limits. But even against this there was strong dissent. Mr. Justice McLean, p. 491, dissenting, says:

"The establishment of the Western District in effect, repealed the juris- "diction of the Eastern District, as to causes of action arising in the Western "District, as fully as if the law had declared 'no jurisdiction shall hereafter "be taken in any case civil or criminal which is of a local character, and "arises in the Western District.' Offences committed in that District are "made local by the Acts of Congress. This is not a case where if jurisdic- "tion once attaches, the Court may finally determine the matter. There "seems to me to be no reason for such a rule in a criminal case, especially "when it is opposed to the policy of the Constitution, and to the principle of "the common law." * * * * * * * * * *

"All this difficulty arises from an omission of Congress to make in the "law dividing the District, the necessary provision, and it appears to me "that we have no power, by construction or otherwise, to supply the omis- "sion. This could not be done in an action of ejectment. A writ of pos- "session in such a case could not be issued to the Western District on a judg- "ment entered in the Eastern. And if such a jurisdiction could not be sus- "tained in a civil action, much less could it be sustained in a criminal case."

"If a person guilty of a crime in the Indian country before the division "could not be indicted, and tried in the Eastern District, it follows that the

"fact of the crime having been committed in the Indian country, can afford "no ground of jurisdiction in the present case. It must rest alone then it "would seem for jurisdiction on the ground that the indictment having been "found in the Eastern District, the same jurisdiction may try the defendants, "and, if found guilty, sentence them to be executed. This view must over-"come the the locality of the crime, and the right which the defendant may "claim to have a jury as near the vicinage as practicable, at least a jury from "the District where the crime was committed. These appear to me to be "objections entitled to great consideration. A jurisdiction in so important "a case should not be maintained under reasonable doubt of its legality."

The result of the same omission in the Act dividing this State, appears to us to have been that during the period from 1823, when the division was made; and, 1856, when the Act next mentioned was passed, the Western District was deprived of the jurisdiction of the Circuit Court, because Congress had not provided a place for its sitting in that district; nor conferred upon it Circuit Court powers and so, also, it was deprived of the benefit of the District Court by the omission of Congress to provide for the drawing of juries for the Western District. But, it is probable, that in the isolation of that part of the State, and the simplicity of the times, that the want was not much felt, as the remedy was so simple under the previous legislation of Congress, and so easily obtained when asked for. This was done in 1856; and Congress, to provide for this district, had two courses open to it, one was, as in the cases of North Carolina and Rhode Island, upon their admission in 1790, and of Vermont in 1791, to annex it to the sixth circuit, or if special enactment for that purpose should be considered unnecessary, simply to provide for the sitting of the Court in some places in that district; the other was to follow the precedent first established in the cases of the Maine and Kentucky Districts, and, with the exception of the three States just mentioned, not only followed upon the admission of every new State up to that time, but applied in every instance, (except in that of North Carolina,) in which a State had been divided into districts.

The Act passed in August, 1856, is as follows:

"*Be it enacted, etc.*, That so much of the Act of Congress, passed the 25th May, eighteen hundred and twenty-four, as provides for holding the District Court of the United States, at Laurens Courthouse, South Carolina, on the

Tuesday next ensuing, after the adjournment of the Circuit Court of the United States, at Columbia, be and the same is hereby repealed, and that in place thereof the said Court shall be holden at Greenville Courthouse, South Carolina, on the first Monday in August in each year.

"Sec. 2. *And be it further enacted*, That the jurors for the said Court, grand as well as petit, be drawn from the inhabitants of Greenville District, South Carolina, who are, or may be liable, according to the laws of South Carolina, to do jury duty in the Courts of law, in the said State, and that the jurors to be drawn, for the first term of the said Court, shall be drawn at the term of the District Court, to be holden in the City of Charleston, provided that they shall be drawn at least ninety days previous to the time appointed for holding the said Court at Greenville, but from and after the holding of the first term of the said Court, all jurors for the next succeeding term shall be drawn at Greenville during the sitting of the said Court.

"Sec. 3. *And be it further enacted*, That the said District Court, for Greenville, in addition to the ordinary jurisdiction and powers of a District Court of the United States, shall have jurisdiction of all causes, (except appeals and writs of error,) which now are, or may be hereafter made cognizable in a Circuit Court of the United States, and shall proceed in the same manner as a Circuit Court." (11 Stat., 43.)

Whatever questions existed before this Act in regard to the jurisdiction of the Circuit Court in and for the State of South Carolina, were intended it would be supposed to be settled by it, conferring as it did upon the District Court for the Western District, Circuit Court powers, *instead* of providing sessions of the Circuit Court in that district. But as if to add still more to the confusion previously existing upon its passage, the Circuit Court sitting at Charleston adjourned to Greenville; sat there under this Act and adjourned to Columbia, taking along the records and business before it from court to court, regardless of territorial limits. This practice continued some three or four terms, until the United States Courts were closed by the war, and was resumed upon their re-opening. We now have the question forced upon us: Is this practice correct?

To understand this question is the purpose of this paper, and the preceding review of the law has been made to enable us to do so.

From time to time, doubts have been entertained by members of the bar in regard to this practice, but the first instance in which it was openly expressed, and then only as a doubt, was

by Mr. Reverdy Johnson in objecting to a *venire* to summon additional grand and petit jurors from "the body of the District," in which terms the whole State was intended, regardless of the division into Districts, to serve in the Circuit Court sitting at Columbia on the trial of prisoners, under the "Enforcement Act." In answer to Mr. Johnson's doubt the District Attorney replied, (Report Ku-Klux Trials, p. 8:)

"If the Court please, the State of South Carolina, is divided into two Dis-
"tricts for the purpose of the District Court. Those Districts are called
"Eastern and Western. The Western District consists of the Counties of
"Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton;
"(since divided by the Legislature): Abbeville, Edgefield, Newberry, Laurens
"and Fairfield; the remainder of the State constitutes the Eastern District.

"For the purposes of the Circuit Court the State of South Carolina, *in toto*
"constitutes a District, and these parties being on trial in the Circuit Court,
"it seems to me that the true and proper construction is that the jury,
"should be drawn from the body of the District which is the State.

"The constitutional point made is undoubtedly true, but what constitutes
"the District? That is the only question. In 1 Brightley's Digest, p. 844, we
"find:

"The sixth Circuit Court of the United States, for the District of South
"Carolina, (since changed to the fourth,) which is required by law to be
"holden on the second Monday in December annually, shall hereafter be
"holden on the fourth Monday in November annually.

* * * * * * * * *

"I think may it please the Court, that there can be no mistake about this
"matter. The position of the gentlemen would be entirely correct, if we
"were in the District Court, but when we come to a Court that comprehends
"the whole State in its jurisdiction, then the juries should be drawn from
"that District."

We will only observe here that the District Attorney appears to have had in Court only, Brightley's Digest, a work which for its purposes all lawyers who consult it have sufficient reason to value, but which is scarcely to be quoted, in the place of the Statute itself, when the point involved is the use of the singular or plural of a noun in the text—the presence or absence of a single letter.

Mr. Johnson seemed very uncertain of his point, as well, he might be, unfamiliar as he necessarily was with the statutory provisions in relation to the State of South Carolina; and

admitting: "It is true that the Circuit Court has jurisdiction as a court over the entire District of South Carolina;" goes on to insist that still the jury must be drawn from the "District" in which the offence was committed. *Ibid.*, p. 9.

Judge Bond doubted the quotations, for he asks:

"Mr. Corbin, have you the Act of Congress that establishes the Fourth Judicial Circuit?"

To which the District Attorney replies:

"The Act of 1862, if the Court pleases, establishes the Circuit: 'Hereafter "'the District of Maryland, Delaware, Virginia and North Carolina, "'shall constitute the Fourth Circuit; the Districts of South Carolina, "'Georgia, Alabama, Mississippi and Florida shall constitute the Fifth "'Circuit.'"

But he adds:

"If the Court please, in an Act still later, which puts South Carolina in the Fourth Circuit, it is spoken of as the 'District of South Carolina.'"

Ibid., pp. 9, 10.

The District Attorney must surely still have been quoting from some index or digest, for the Act of 1866 mentioned by him "as a still later Act," provides that the "*Districts* of Maryland, West Virginia, Virginia, North Carolina and South Carolina, shall constitute the fourth Circuit." (14 Stat., 209.)

It is scarcely to be wondered that under this advisement of counsel, his Honor Judge Bond, should have held, "that, so far as the Circuit Court is concerned, there is but one District in South Carolina."

But it will be observed, that to get rid of the question in this way, is but to substitute one supposed anomaly for another. For it is to declare that, for the State of South Carolina there is *one* District for the Circuit Court, but *two* Districts for the District Court, a condition of things found in no State or territory, at any time, in the history of the courts of the United States—without judicial precedent or statutory authority. Nor only so. Some such suggestion, it is probable, was made in regard to the division of the State of New York, in 1814, (*ante p.* 7); for we recollect that by an Act of 1818, (*ante p.* 8), Congress construed

this Act for itself, and declared that the original jurisdiction of the Circuit Court of the Southern District of New York shall be confined to causes arising within said District, and shall not be *construed* to extend to causes of action arising within the Northern District of New York. This Court, it will be remembered, had appellate jurisdiction from the District Court of the Northern District of New York. Surely Congress, when it said that in one instance an Act should not be *construed* in a particular way, did not intend the forbidden construction to be put upon the same words, when subsequently employed in regard to another State. It construed its own language in the one instance and that construction must be accepted in other like cases.*

But Mr. Conkling, in his treatise on the jurisdiction of the United States Courts, (2 edition, 1864, p., 265) suggests that it may be thought that the Acts of 1862 and 1863, re-arranging the Districts into Circuits, intended to extend the Circuits over all the Districts, whether possessing ordinary or extraordinary jurisdiction, and it is also said that the object of the Act of 1869 providing for Circuit Court Judges was to bring all the Districts within one homogeneous system, by which these District Courts, with extraordinary powers, were intended to be superseded. The rule we have already seen to be, where a Court such as these, have had and taken jurisdiction, it can only be taken from it by express words or necessary implication, (*Ante.*, p. 16) and Congress it is evident contemplated no such effect from its enactments.

Mr. Conkling has shown that no such effect was proposed by the Acts of 1862 and 1863, discriminating as it did between certain District Courts, which had these extraordinary powers and others; taking from some, by name and in terms, these powers and jurisdiction and remaining silent as to others.

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* § 8 Where words are general, and a statute only declaratory of the common law, it shall extend to all others besides the persons or things named, the stronger cases only are put, the weaker included; thus where the King's Bench only is mentioned, the provision was held to extend to the other principal courts." (*Dwarris' Stat.*, 605.)

He observes however, that it appears improbable that Congress designed to leave the Courts for the six districts, as to which the Act of 1862 is silent (among them that for the Western District of South Carolina) in possession of their extraordinary jurisdiction, but that the supposition of an assumption by Congress that the introduction of Circuit Courts into those districts would, by implication deprive those District Courts of their jurisdiction seems still more objectionable, as such an assumption would impute to Congress inconsistency. The most probable explanation, he suggests, is that the fact of the possession of these Courts with extraordinary jurisdiction was overlooked. *We* do not believe that it was.

The Circuit Courts were not introduced into those districts but the District Courts with Circuit Courts jurisdiction retained their Circuit Court jurisdiction within their territorial limits.*

Nor is there any ground for charging Congress with overlooking these District Courts with extraordinary powers. These courts had been devised in the inception of the judicial system as a part of it. Their extraordinary powers had been by a solemn enactment, again and again conferred, and, whenever Congress saw fit withdrawn. They were too numerous and presented too important a part of the system to have been overlooked. Indeed by the familiar maxim *expressio univs exclusio alterius*, the repeal in specified instances confirmed the jurisdiction in the remaining cases.

There is a much plainer reason for the action of Congress. It withdrew the Circuit Court powers from the District Courts wherever it was practicable to provide a justice of the Supreme Court to sit occasionally in a Circuit Court, but where that was impracticable it left the District Court with its Circuit Court jurisdiction.

But we are now enabled to show by express legislation, that Congress did not consider that by the Acts of 1862 and 1863, it had taken away this jurisdiction, any more than it had by the Acts of 1802 and 1837 re-arranging the circuits.

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*See *Toland vs. Sprague*, and Act of 1818 construing the Act of 1814, dividing the State of New York, *ante p.* 8.

The most cursory perusal of the Act of 1869 for the appointment of Circuit Judges will show that there is not a word in it that can be construed to repeal the powers and jurisdiction of any Court. It enacts "§ 2. That for each of the nine *existing* "Judicial Circuits there shall be appointed a Circuit Judge who "shall reside in his circuit," &c.

But Congress has been even more explicit. By Act July 1, 1870, it has declared, "That nothing in the Act to amend "the judicial system of the United States, approved April ten, "eighteen hundred and sixty-nine, shall be construed to require "a Circuit Court to be held in any Judicial District in which a "*Circuit Court was not required to be held by previously existing* "*law.*" (16 Stat., p. 179.)

And consistently with this legislation, in 1872 an Act was passed repealing the Circuit Court jurisdiction previously granted to the Northern District of Georgia, and providing that, that district should thereafter be attached to the same circuit as that to which the Southern District should be assigned. (Stat. 17, p. 218.)

The Supreme Court certainly does not consider that the Circuit Court jurisdiction had been taken from the District Courts upon which it had been conferred prior to December, 1870, for in revising its rules at that time it provides. (Rule No. 8, Sec. 3.)

"Whenever it shall be necessary or proper in the opinion of "the Presiding Judge in any Circuit Court, or *District Court* "*exercising Circuit Court jurisdiction*, that original papers should "be inspected in this Court upon appeal or writ of error, such "Presiding Judge shall make such rule or order, &c., &c.

But not only did the jurisdiction of these District Courts, with Circuit Court powers continue, unless taken away by express enactment, but it was exclusive of the Circuit Court within its jurisdiction. Upon this point we have already (*ante p.* 16) cited Dwarris on Statutes, but the case there cited is more in point than the text of that work.

It will be recollected that by the Act dividing the State of South Carolina into two judicial Districts, it is provided:

"And for the trial of all such civil and criminal causes as are by law cog-"nizable in the District Courts of the United States, which may hereafter "arise or be prosecuted, or sued within the said Western District, there *shall*

"*be* one annual session of the said District Court, holden at Laurens Court-"house, to begin &c.," and that the subsequent Act conferring Circuit Court powers, provided "that the said District Court for Greenville, in addition to "the ordinary jurisdiction and powers of a District Court, *shall* have juris-"diction of all cases which now are, or may be hereafter made cognizable in "a Circuit Court of the United States, &c."

Now in the case referred to by Dwarris 612, (*Crisp vs. Bunbury, 8 Bing., 394,*) it was provided by statute (9 Geo., 4,) that in case any dispute should arise between certain institutions, or any person acting for them, etc., "that the matter so in dispute *shall* be referred to the arbitration of certain persons therein designated;" and it was contended on the part of the defendants, that the enactment was imperative upon the plaintiff, taking away the jurisdiction of the Courts of Common Law, and leaving the party who complains no other mode of determining his claim than that which was pointed out and provided by the Act. The plaintiff insisted that though his case fell within the purview of the Act, that the jurisdiction of the Courts of Common Law was not ousted by the words of the Statute, which only created a concurrent, and not an exclusive jurisdiction. But the Court held, Tindal, C. J., delivering the opinion, that the plaintiff was barred from maintaining the action in the Court of Common Law, and must pursue the remedy provided by the Statute.

The Act of 1823 provides that there shall be an annual session of the District Court, for the Western District, for the trial of *all* such civil and criminal causes as are by law cognizable in that Court, and the Act of 1856, that that Court *shall have* jurisdiction of all cases cognizable in a Circuit Court. Under the rule of construction in *Crisp vs. Bunbury*, independent of the statutory limits of the Circuit Courts, these provisions appear to preclude the exercise of jurisdiction by any other Court of the United States in the Western District.

But it is said that the Court for this District is anomalous, in another respect that it contains no provision for appeal, either to an adjourning Circuit Court, as in the case of the Maine District, or directly to the Supreme Court, as in the case of the Kentucky District. The same omission, if omission it may be

called, occurred in the Acts constituting the like Courts for the Districts of Tennessee, Ohio, Louisiana, Illinois, Alabama, Missouri, Arkansas, Michigan, Florida, Wisconsin, and Iowa, and its effect was fully considered by the Supreme Court in the case of the District Court of New Orleans, prior to all these Acts, but those constituting the Districts of Tennessee and Ohio.

In 1810, in the case of *Durouseau vs. The United States, 6 Cranch, 307*, the Attorney-General, Mr. Rodney, demurred to the appellate jurisdiction of the Supreme Court from the District of New Orleans, which it will be recollected was a similar Court to that of the Western District of the State, because it had not been provided by the Act organizing that Court that appeals should lie to any other.

Chief Justice Marshall delivering the opinion held that the appellate powers of the Supreme Court are given by the Constitution, and are only limited and regulated by the judiciary and other acts upon the subject, and its appellate powers extend to every case not expressly excepted by Congress under its constitutional power. The demurrer was overruled and the appeal heard. The Chief Justice observing that the Supreme Court had previously taken jurisdiction of a cause, brought by writ of error from Tennessee, but that the question was not then moved, and consequently was open. But after this decision, (*Durouseau, vs. The United States*) the reports of the Supreme Court are full of appeals from and writs of error to District Courts with Circuit Jurisdiction, in the organization of which no provision was made for appeal.

It may be observed, however, that in the case of the New Orleans Court, its Circuit Court jurisdiction had been conferred by declaring that its Judge "shall in all things have and exercise the same jurisdiction and powers which are by law given to or may be exercised by the District Court of the Kentucky District," whereas in the Act conferring that jurisdiction upon the District Court for the Western District of South Carolina, the jurisdiction and powers of the Judge of the Kentucky District are not referred to in terms, but the same language is used in the Act of 1856 to confer those powers upon the District Court of the

Western District of South Carolina, as had been employed by the Act of 1789, in conferring them upon the Kentucky Court. The ruling in the case of *Durouseau vs. The United States*, applies therefore to the District Court of the Western District of South Carolina as well, and appeals lie from it directly to the Supreme Court of the United States.

It will be recollected that by the organic law of the Courts of the United States, (Oct. 1789,) no person could be arrested or sued in any other District than that of which he was an inhabitant, or in which he was found at the time of serving the writ, and that the process of the Circuit and District Courts could not run beyond the territorial limits of the *district* for which the court, (circuit or district,) sat. (*Toland v. Sprague, ante p.* 13.) In the case of the Districts of East and West Tennessee, we saw this rule somewhat modified by Act of 1822, provision being made in regard to those districts, that where suit was brought against two or more citizens of that State, some of whom resided in one district and some in another, that the party suing might elect in which district he would sue; and that the Clerk might issue duplicate writs to the Marshal of the other, returnable however, to the Court from which it issued. This provision has since, by Act of 1858, been extended to all States containing two or more Districts; the plaintiff in *transitory* actions having the right in such cases to elect in which district he will sue, and to a duplicate writ to be served upon the defendants residing in the other; and in cases of a *local* nature, the plaintiff having the right to process upon a defendant residing in another district than the *locus in quo*. (11 Stat., 272.)

From the preceding review of the history of the courts of the United States, it appears that Congress, in "ordaining and establishing" a system for the exercise of the judicial power of the United States in pursuance of the Constitution, provided for the organization of the Supreme Court as prescribed, and for the District Courts as "inferior courts," within the language of that instrument. That these Courts were at first entirely distinct and separate, having each its own Judge, Clerk, Marshal,

and other officials; each existing *sui juris*. Upon this as the basis of the system was constitued the Circuit Courts, composed of members of both Supreme and District Courts, but having no officers of its own, nor independent existence, and having a more general jurisdiction, limited as to persons, but unlimited as to causes, and which jurisdiction within its limits was both original and appellate.

But from the very first, it was found impracticable to provide the Circuit Courts for certain Districts, and as the exercise of their powers and jurisdiction, though limited, was an essential part of the plan ordained, the scheme was devised of conferring upon the District Courts for such District, the necessary circuit court powers, with appeals either to an adjoining circuit, or directly to the Supreme Court.

This scheme adopted in the first instance for the outlying Districts of Maine and Kentucky, was found convenient in application to the new States as they were, from time to time, admitted, and with the exception of North Carolina, Rhode Island and Vermont, has been applied to each State coming into the Union, as the laws of the United States have been extended to it; and also to new Districts carved out of others, as in the case of the Northern District of New York, the Western District of Pennsylvania, and many others, including the Western District of this State.

In a few instances the appeals from these District Courts were given to the adjoining Circuit Courts, as in the instance of Maine and the Western District of Pennsylvania; but in the case of Kentucky it was given directly to the Supreme Court, and as in almost every other instance special jurisdiction was conferred either by reference to the Kentucky Act, or, in the language of that Act, the appeal, as we have seen, (*Durouseau, vs. The United States*) lies directly to the Supreme Court.

In the State of South Carolina, we have, therefore, three distinct United States Courts, one District Court for the Eastern District, and one District Court for the Western District, (which latter has circuit court jurisdiction and from which appeals lie directly to the Supreme Court), and a Circuit Court for the

Eastern District; each of which are separate and distinct. The records of the District Court for the Eastern District have, under the Act of 1789, been kept at Charleston, one of the two places of holding the Court for that District: the records for the Western District it appears should, under that Act, be kept at Greenville, the only place for holding the Court in that District. The two Districts are distinct, and each Court sitting in them, Circuit and District, is bounded in its jurisdiction by the territorial limits of the District for which it sits, and unable to send its process into the other save in accordance with the Act of 1858, or its execution save in accordance with the Act of 1826.

IN THE

SUPREME COURT UNITED STATES.

CHARLES KERRISON, ASSIGNEE,

vs.

A. T. STEWART & CO., PATTON & CO., AND OTHERS.

ARGUMENT OF EDWARD McCRADY IN BEHALF OF APPELLANTS, IN REPLY.

The contest in this case is between *bona fide* creditors of the bankrupts, Kerrison & Leiding, who were successful merchants up to the late civil war, and at the end of it supposed that they possessed ample means for the satisfaction of all their creditors, if a short time should be given to them to resume their business, and to convert their real estate into cash, for the payment of their debts. They offered to all their creditors alike, for the indulgence of two years, to mortgage all their real estate in South Carolina and North Carolina, by a conveyance in trust, which was the usual form for mortgages in the latter State, with a power of sale. Full time was given to the creditors to examine into the affairs, acquaint themselves with the sufficiency of the security, and then to accept or reject their proposition. Even the trustee was named to the creditors for their approval. All the creditors, except A. T. Stewart & Co., finally acceded to their terms offered, and the conveyance was made, and these creditors accepted in writing, in a schedule in which they were named, and which was attached to and formed part of the deed, and took notes payable in one and two years. A. T. Stewart & Co. insisted upon payment in full in cash, and sought to gain their end by suit at law. All the other creditors rested upon the mortgage made to secure them.

A. T. Stewart & Co. now insist that they have obtained a judgment which binds the mortgaged property, because they say the mortgage or trust deed was fraudulent as to them, and has been so declared by the Courts of South Carolina.

The other creditors (appellants) insist the deed is a good deed, fairly and openly made, untainted by any fraud whatever; that A. T. Stewart & Co. have not now, and never had a judgment which could bind the real estate mortgaged by the bankrupts, and that as to what was done by the State Courts in setting aside the mortgage in favor of a pretended judgment, they have no concern, as they were neither parties nor privies to the proceedings in those courts.

The controversy seems naturally to arrange itself under these questions: (1.) Have A. T. Stewart & Co. a valid judgment, binding the real estate in South Carolina, paramount to the deed? (2.) Have the other creditors, parties to the deed, a valid mortgage of the same real estate, paramount to the judgment? If the deed be good, as it is prior in time, it must take precedence of the judgment in satisfaction, even if the judgment be a good judgment. If the real estate could satisfy both judgment and mortgage, there would be no collision of interest and no contest. It is the insufficiency of this real estate which makes the questions practical and requires their solution. Each party then is directly interested and must be entitled to examine the other's title to the same real estate claimed by both. As A. T. Stewart & Co. might examine the mortgage to see whether it is an effectual conveyance, and object to anything which would make it invalid as a deed; if, for instance, on inspection it was found it had no seals, or no witness, or its words were inapt and insufficient to convey—any one of these objections could be made to it by A. T. Stewart & Co. So, if A. T. Stewart & Co.'s judgment, upon inspection, is found to be no judgment, either because the Court in which it was enrolled had no authority to grant it, or because there was no judgment roll to be found in the Court in which it is alleged to have been rendered, the mortgage creditors must have right to object to A. T. Stewart & Co.'s title, as much as if they, A. T. Stewart & Co., claimed under another conveyance from the common debtors.

Whether these debtors, Kerrison & Leiding, admit or deny, or have admitted or denied, the validity of judgment, or mortgage, can make no difference to these parties, who are claiming the same property, under adverse titles, from the same parties.

I. The first point, or question, is as to the validity of A. T. Stewart & Co.'s title. It is conceded, indeed, strenuously insisted, that if that judgment is not good, then the proceedings in the State Court are erroneous (at p. 14 of appellees' argument). This point has been so fully argued in appellants' counsels' opening argument that very little can be said now. No record of any one competent Court is produced, and it is impossible to supplement the proceedings in one Court with the proceedings in another Court (if both were competent), in order to make up what we can recognize as a common law judgment roll. To avoid this, it is said, whether the judgment is or is not good, according to the common law, Kerrison & Leiding cannot object to it in this collateral way, but must assail it directly in the Court in which it is entered up as a judgment, in order to get rid of it. This is only a dexterous way to lead us off from the true issue. Kerrison & Leiding have nothing to do with us. We are claiming *against* them, not for them, or through them, since the judgment, but against them and A. T. Stewart & Co. both. Against both plaintiffs and defendants in this pretensive judgment. If Kerrison & Leiding admit it to be a good judgment against themselves, we have nothing to do with that. The question is, whether it gives a better title to the real estate than their conveyance to Charles Kerrison for our use and benefit. It is immaterial which side Kerrison & Leiding may now favor; it is the title to real estate once theirs which is in question. The mortgagees stand outside of the Court and the judgment, and object to it only because it is set up to defeat their title. If Kerrison & Leiding have any other property out of which this judgment may be satisfied, than that which we claim, and are willing that A. T. Stewart & Co. should levy upon and sell it, we can have nothing to say about the judgment. It is only when it is set up to take away our property from us that we claim the right to see that it is a judgment indeed, and not a mere pretension.

Another argument is pressed to evade a full examination of the validity of the judgment upon sound legal principles and rules, based upon the maxim *ab inconvenienti*, namely, that many titles to real estate sold under judgments, like this, would be subverted. This is pure assumption and assertion, and nothing else. We do not know of a single title resting on the validity of such a judgment, and we do not believe that after most diligent search a half dozen such titles could be found. Then appeal has been made to the maxim *cum munis error facit jus*. Enough has been already said upon the subject of this maxim to prove its inconclusiveness and how little authority there is for it. We venture to suppose it is a maxim which never can be applied with wisdom to any thing else than the interpretation of contracts which may have been made in reference to the common error or usage, and even then with great caution, as it cannot always be supposed that both parties had mistaken the law, without clear proof. If ever there can be a case where it cannot apply it is this, in which the jurisdiction, course and practice of Courts created by statute is brought into question.

Again it is argued that this judgment has been set up and established in a Court of Equity in the State of South Carolina. How does this appear? If, as is alleged in appellees' argument, (at pp. 21, 22,) "the record of the State Court is not now before this Court, the case having been tried upon the bill, answers and statement of facts agreed upon," is there anything in bill, answers or statement of facts to show that this judgment was established, even against the trustee, Charles Kerrison? In the bill and answers it is in various places stated that there was in the United States *Circuit* Court for South Carolina a judgment of A. T. Stewart & Co. against Kerrison & Leiding, but the judgment in the record is a judgment upon a verdict in a *District* Court for the Western District of South Carolina, which we deny to be any judgment at all. Then, if we look into the proceedings in the State Courts, to which appellees' counsel, in another page of his argument (at pp. 13, 14) refers, it will be found the allegation in the bill and the admission in the trustees' and bankrupts' answers is, that there was a judgment in the

United States *Circuit* Court for South Carolina, which now is not pretended; but another judgment is produced and pleaded as a record of the District Court for the Western District of South Carolina, having Circuit Court jurisdiction.

We deny that the appellants are bound, in any manner whatever, by the proceedings in the State Courts, and this is really the only point which is to be considered in the appellees' argument, namely, that our clients are bound by the decrees in the Courts of the State, and it is upon this ground the Circuit Judge rests the decision from which this appeal is taken. This point has already been fully argued in behalf of appellants, and but little shall be added to what has been said.

If bound, they can only be bound as parties or privies, and they are neither. It is not pretended that there was any attempt to make any of the appellants parties, except by publication as in cases of absent defendants, under an Act of the General Assembly of the State of South Carolina. Excluding the record of the proceedings in the State Courts, there is no evidence of any compliance with the terms of that Act. If that Act be relied on to prove that the appellants were parties, then it is necessary that the appellees should show that they were made parties strictly according to the provisions of the Act. This has not been shown, and cannot be shown with or without the proceedings in the State Courts; for it is not anywhere averred in the pleadings in this cause that the proper return was made by the Sheriff, or any affidavit required by the Act, or that all the terms of the Act, which is before the Court, had been complied with. In such a proceeding, the absent defendants never can be charged with having waived any irregularities, because they are not parties until everything has been done which the Act prescribes, and everything required is of record, so that it may always after appear by the record itself that they have been regularly made parties. (Galpin *vs.* Page, 18 Wallace, 350.) It makes no difference whatever whether this point was made below or not. If the proceedings in the State Courts are a part of this record, the omissions are apparent on its face, and we can object. If the proceedings in the State Courts are not part of this record,

then it is manifest that there is no evidence, even no assertion, that the terms of the Act were complied with.

Then again it is said, both by appellees and the Circuit Judge, that none of the creditors represented as appellants were necessary parties. This point has been elaborately, and, it is thought, conclusively, argued already, and the grounds upon which it is maintained that the mortgagees were not only necessary, but indispensable parties, fully stated, and have not been answered in appellees' argument. There has been, perhaps, as great difficulty in Courts of Equity upon this subject as upon any branch of their jurisdiction.

To bind one who has a real interest in any cause, when he has never been heard, and has never had the opportunity to be heard in his own behalf, is so contrary to our sense of natural justice, that the Roman recognized it as the right of the Jew, to be heard when he stood before him accused by his whole nation. Then, to refuse to administer justice as far as possible among suitors before the Court because of the absence of some who could not be brought before it, but whose interests were fully represented by others having *identically* the same interests, actively engaged in litigating and asserting them, seemed unreasonable. After much discussion and some vacillation, all Courts of Equity appear to have settled down upon distinctions perfectly intelligible to all who will give the subject serious consideration; which, so far as concerns the present case, may perhaps be stated as follows: Parties may be ranged under three classes, (1) Proper parties; (2) Necessary parties; (3) Indispensable parties.

(1.) It was recognized that all persons having any interest in the subject of the controversy were at all times *proper parties*, however numerous, and no objections could be made by themselves or by others, if they were all brought into Court and given the opportunity to present their claims. They might or might not avail themselves of the opportunity afforded them—they might join in the litigation or stand by silently and abide the result or disclaim; but whether they did or did not use the opportunity given them, they would all be equally bound by the final judgment in the cause.

(2.) It was recognized that it was possible sometimes to go

on with the administration of justice among parties before the Court, although it was apparent that others as deeply interested, but whose interests were *identical* with that of some of those who were in Court actively litigating in behalf of their interests, could not be found, or could not be brought into Court, or were so numerous as to make it almost impracticable to carry on a suit if they were all brought in, and their deaths, or bankruptcies, permitted to impede the progress of the cause. Here was always great need for sound discretion, especially where the only objection was that of numbers. The absent parties in such cases were admitted to be necessary parties to the cause, if possible to bring them in, but as their interests were fully and actively represented, the suit was allowed to go on without them, at the hazard that they might afterwards assert their right to review whatever was done, as they would have the right to do, never having been heard in support of their interests. "The complainant has the option to make him a party, or to proceed without him, and take the hazard of the consequences." Swayne, J. (in Robertson *vs.* Carson, 19 Wall., 94, at p. 106). This was said of a mortgagee who was not brought before the Court, which is our case precisely.

(3.) It was recognized that there were some cases in which the Courts would never venture to administer justice even among those before them, where it was manifest that others, who could be made parties, had distinct and independent right to assert their claims, or titles, with those who were before the Court; as in cases involving the title to real estate, (Barney *vs.* Baltimore City, 6 Wall., 280), or where the absent parties could be supposed to have complete knowledge of facts necessary to be ascertained by testimony, which they, the absent ones, only possessed, or where accounts were to be taken, which they only could make. (See Robertson *vs.* Carson.) Such parties were held to be *indispensable* parties, and the cause could not go on without them.

If our clients were only proper parties they would not be bound by the decree of the State Courts, as they were never actually before the Court, nor was there any one before the Court, whose interests were *identical* with theirs, actively

litigating for their interests. This is apparent on the face of our record. To escape from this difficulty, it is argued by appellees' counsel, that the trustee, Charles Kerrison, was the proper representative of all the creditors who are now appellants in this cause. And upon this position the Circuit Judge rested his judgment. This, it is submitted, is a great mistake. The trustee was no more the representative of the creditors who accepted the deed of trust, or mortgage, than he was of the grantors and bankrupts, Kerrison & Leiding—no more their representative than were these bankrupts and grantors themselves. The trustee had duties to perform to both, and was answerable to, and might have been called to account by, both the debtors who had conveyed to him, and the creditors, for whose benefit the conveyance to him was made; but he represented neither in this controversy before the State Courts. Had there been a suit against him to recover the real estate which had been conveyed to him, in so far as the legal title was in him, he might have been considered as the only one who could or need be brought before a Court of law, in an action to settle the question of *legal* title. But there was no question about the legal title, and the suit was in a Court of Equity. There never was any contest with, or charge against, the trustee by either of the parties to this appeal. Both admitted his legal title, and each claimed that the proceeds of the real estate held by him was to be applied first to their demands in preference to the others. The real contest was about the application of the proceeds of the realty among the two classes of the grantors' and bankrupts' creditors. The question was directly between these two classes of creditors (appellants and appellees in this cause), in which the trustee had no interest in behalf of either. The creditors who claimed under the terms of the trust deed, or mortgage, had made contracts with the debtors, the grantors, and the present bankrupts, for this security, in consideration of time given to the debtors, and this was known to A. T. Stewart & Co., as were all the contracting parties also known to them (A. T. Stewart & Co.), who resided in the same city with the majority of those creditors. Under such circumstances, all the creditors claiming under the deed were abso-

lutely indispensable parties, and not a single case can be found in which a trustee, under such circumstances, was ever held to represent creditors. In such cases as these the number of the creditors is no excuse for not making all of them parties, for each one has his own separate distinct claim upon his own several contract, and must be present both to vindicate his right to participate in the proceeds of the trust, or mortgage, property, and also to the proportion he claims, even against those he admits have the right to participate. The trustee cannot represent him in either of these interests which he has acquired by contract with the makers of the deed.

The New York cases relied upon by appellee's Counsel, have been reviewed in the opening argument for the appellants, and will require very brief notice to show that they do not sustain the position for which they are cited. That position is, that the creditors who accepted the deed and took new notes are bound, because the trustee was a party to the cause in the State Courts.

The first New York case, *Riggs vs. Murray, 2 Johns. Ch., 565*, was a case in which the parties defendant before the Court had the whole title and interest in the property conveyed, and there was not another person or party who had any indefeasible right to anything under the trusts of the deed. The grantors had reserved to themselves power to annul and revoke all the uses and trusts, and to declare new uses and trusts, and to change the trustees. Ch. Kent, at p. 573, says: "The power also reserved to change the trustees, shows that the grantors intended to retain to themselves the entire control of the deed of trust," and it was this that constituted the fraud. In our case nothing was reserved, except by implication, if the grantors had paid their notes.

In *McMenomy vs. Murray, 3 Johns. Ch., 435*, (the second case relied on), so little attention was paid to the subject of parties, that the reporter does not mention who the parties, defendants, were. It is Chancellor Walworth who says this was a precedent for him, but it is certain the report of the case does not show this in any manner. The deed was sustained, and, therefore, no one interested in its provisions ever made any question about it, or about the parties to the suit.

In the third case, *Rogers vs. Rogers, 3 Paige, 379*, the principal question was, whether the complainants had sustained their character as executors. The Chancellor did decide that the complainants could proceed with their suit without the Bank of New York as a party, but then it does not appear that the Bank had ever made itself a party to the deed by accepting its terms, or that it was required to do so by the deed. The Bank was not bound to anything by the deed, and had never acquiesced in it, so far as the case shows. The Chancellor does not say, nor can it be inferred from anything in the report that he held, that the Bank would be bound by his decree when it was not made a party, which is the point in this case to be established by appellees' Counsel. On the contrary, the next case to be noticed gave him the opportunity to speak to this point, and he did speak in such wise as to make it sure he would not have held the Bank so bound.

The fourth case is the case of *Wakeman vs. Grover, 4 Paige, 23*. In this case there were schedules of creditors annexed to the deed; but it does not appear from the Report that any of the scheduled creditors had made themselves parties to the deed by accepting its terms as they were required to do. It does appear, however, that Ch. Walworth expressly recognized that one whom it was insisted was a necessary party, would not be bound by his decree, as he was not a party. At p. 32, he says: "It appears by the answers that there is no real estate on which judgments could be a lien, unless it be the two church pews. So far as respects those, no decree can be made here which can affect the rights of judgment creditors who are not parties to these suits. If the assignment is valid these judgments are no lien upon the property. And if it be set aside as fraudulent the oldest judgment at law will have the preference, notwithstanding any decree which may be made in a suit to which the owner of that judgment is not a party. He may be interested in the question to be decided here, but cannot be affected by the decree." These four cases then certainly do not support the position which appellee must establish, while they are altogether consistent with our position, which seems to be distinctly recognized as correct in the last of these cases above reviewed.

Then again it is contended that the trustee *only* was necessary, because the notes held by these creditors and secured by the mortgage were negotiable notes, and cases upon railroad mortgages securing bonds payable to bearer are cited and relied upon to support this position. But the distinction and difference between the two cases is plain, and has been noticed judicially. If these notes were made in such form as to become negotiable by endorsement, they were not negotiable until so endorsed, and it is shown by these proceedings in bankruptcy that many of them still remain in the hands of the original holders; and surely the attempt ought to have been made to ascertain whether they had been negotiated before that their negotiability could be rendered as an excuse for not making the original holders parties, as the presumption was that the original holders held them, and no others could have *identical* interests with the holders of those original notes. The plaintiffs would not have been obliged to hunt after the holders of any notes after they had been actually negotiated and put in circulation, but they were bound to look after the original holders of the notes and contractors for the security of the trust deed, who had contracted with the makers of the deed, Kerrison & Leiding. The case of *Newton vs. Egmont, 5 Sim., 130*, is directly in point here, and it will so appear upon reference to the citation, found on page 16, of the appellant's opening argument. These notes were not like railroad bonds, payable to bearer, and intended to be put upon the market for sale from the very first, but were made and delivered to each of the contractors in the amounts due to them respectively, which amounts were secured to each respectively by the trust deed or mortgage, just as perfectly as if held by a several mortgage for his note.

Another class of cases produced by appellees' counsel in support of this position is, where the trustee holds for pure beneficiaries or volunteers, having no claim whatever but the generosity which prompted the provision made for them as executors for legatees, or trustees under a devise of real estate, and reference is made to the forty-ninth rule of this Court as authority. That rule does recognize that executors were the only parties necessary where the right to personal

property was brought into question, although the property was given in part or in whole to legatees. The reason is clear. Executors stand entirely in the place of the testator as to title, and the disposition in favor of legatees is always subject to the assent of the executor to the legacies, as he has other duties to perform in virtue of his office, which may defeat the legacies entirely. But the forty-ninth rule (which is the same as a rule of the English Chancery,) provides for the case of the *devise to trustees*, because the rule in Equity was otherwise before, that is, required all *cestui que trusts*, having interest in or charge on land devised, to be made parties, and it is to be remarked that when this Court made this rule, they confined it to cases of trustees under devises, and would not extend it even to deeds *inter vivos* made for the benefit of volunteers. By limiting the provision made by the rule to trustees under devises, it is plain this Court recognized the old rule about parties, even in deeds to provide for volunteers, and under such deeds, even volunteer beneficiaries must still be made parties. There seems to be no other deduction to be made from this forty-ninth rule. But the case before this Court is not the case of volunteers, but of *bona fide* creditors, who surrender old notes and take new ones, giving time to the debtors, in consideration of a real security, under the form in use in many States for giving such security, as is generally designated as a mortgage.

In one important particular the point made in this case by the appellees is far in advance of any case which has been or can be produced. It is this: In all the cases relied on there were some parties to the cause litigating in good faith in behalf of the *identical* interests of those who ought to have been made parties also, but who could not be made parties for some cause, recognized by the Court as a sufficient cause for not bringing them into Court. In this case the attempt is made to substitute a statutory process against parties out of the jurisdiction, for actual service, and a mere *pro confesso* upon that statutory process for active litigation in behalf of the interest involved. No case like this has ever been maintained. It is dangerous enough to allow a plaintiff to select the parties he chooses to make the representatives of a class

intended to be bound by a decree in a cause where they were really never made parties, and were never heard in behalf of their rights and interests. To allow him to choose parties for this purpose out of the jurisdiction, who are only made parties in statutory form, and may never hear of what is going on against them, never appear, never litigate for their interests, and then to bind not only these parties, but all others who may have the same interests, seems to be monstrous.

Nor is this all; but when these parties who were never heard come and point out what they conceive to have been errors, or circumstances material in their cases, which have been overlooked, they are to be told they cannot be heard to say anything against the decree, however just and reasonable their objections to it, because they are estopped by the potent effect of a formal statutory process which has been pursued to make some other persons parties, who, by another fiction of *equity*, have been made their representatives without their knowledge or consent. If this be equity, then it should be more admired for the ingenuity it exercises in administering justice against all reason, than for its ability to furnish remedies for evils which the common law cannot reach. Nor is this all that is attempted; but the effort is made to shut out all inquiry as to the care and mode with which the statutory process was pursued and complied with, to make the absent creditors parties, although these creditors came into this Court, which has rightfully assumed to do justice in this cause, within the period allowed by the statutes under which they were made parties in the State Court, to show cause against the decree.

It is apparent that appellees' counsel has relied upon elementary writers for some of his statements of the cases referred to by him. Pomeroy, one of those cited by him, certainly did not have in his mind such a case as this before the Court, when he wrote, and cited the cases from Minnesota and Iowa. The cases of *Winston vs. Minn. R. R.*, (*4 Minn.*, *313*,) although it did decide that the holders of bonds payable to bearer, were not necessary parties in a suit assailing the deeds made to the trustee to secure the bonds, did recognize the right even of such bondholders to apply to the

Court in which the cause was pending to be allowed to come in as parties defendant, and the application was only refused after a full hearing of the grounds upon which the applicant asked to become a party, and a decision upon those grounds that they were not sufficient by the Circuit Judge, whose determination was sustained by the Court to which the appeal was taken.

II. The second question is as to the title of the appellants. If they are not precluded from examining the judgment under which A. T. Stewart & Co. claim, and are not bound by the decree in the State Court, and, therefore, free to make their claim under the trust deed or mortgage. Is that deed a good deed, or is it fraudulent and void under the 13th of Elizabeth? It has been shown by many cases cited in appellants' opening argument, especially by the case of *Tenant vs. Stoney*, in South Carolina, (1 Rich., Eq., 222.) that when the deed was drawn and executed, there was good ground for the opinion, that the trust deed was a good deed, and that such a deed would have been sustained in the English Chancery, (*Alton vs. Harrison*, *Payson vs. Same*, Eng. Law Rep., 4 Ch. App., 622,) and therefore, those who accepted the deed and parted with their old notes, and took new ones, had reason to believe that Kerrison & Leiding were acting in good faith with them, and were offering them a valid and substantial security. The State Judge, who made the decree on circuit, expressly declared, that there was no moral fraud. He said in his opinion: "I see nothing in the case to warrant the implication of moral fraud."

The parties to the deed were then all innocent of any moral fraud; and the cases of *Tenant vs. Stoney*, in South Carolina, where the real estate is located, and the cases of *Alton vs. Harrison*, and *Payson vs. Same*, in England, (*neither of which was noticed in the opinion of the Supreme Court of South Carolina*), were adjudications in favor of such a deed when these creditors, residing outside of South Carolina, dealt with their debtors. Kerrison & Leiding in good faith—surrendered their notes and took new ones, and gave their debtors an extension of time for payment, on the faith of what was innocently and honestly done to secure them. These creditors certainly did not

intend to commit, nor did they commit, any fraud in acceding to the terms proposed to them by their debtors. If there ever was a case where the maxim of *communis error* could be justly applied, it was here where the error, if an error, was countenanced by such high authority, and the contracts were made in reliance upon such authority. Shall a decision in the State of South Carolina, made in Courts just constituted upon a revolution in the Judiciary, and in every department and branch of government, be enough to deprive these *bona fide* creditors of what they had contracted for as a security upon a valuable consideration? It is not the grantors or makers of the deed who are to suffer, but *bona fide* creditors of other States, who have dealt openly and fairly. The appellees' Counsel rests his case entirely upon the decision in the State Courts as to the invalidity of the deed. He does not attempt to answer the opening argument in support of the deed, and nothing more shall be said upon this point, as even the Judges of the Supreme Court of South Carolina who made that decision, were unable to agree upon the grounds upon which it could rest, and entirely overlooked, or utterly disregarded the cases directly in favor of the deed, although they were brought fully to their notice.

Edward McCrady

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

CHARLES KERRISON, ASSIGNEE OF KERRISON & LEIDING, IN BANKRUPTCY, ET AL., APPELLANTS.

vs.

A. T. STEWART & CO., AND OTHERS, APPELLEES.

POINTS AND AUTHORITIES SUBMITTED BY PRESSLEY, LORD & INGLESBY, IN BEHALF OF APPELLEES.

The first question in this case is as to the validity of the judgment recovered by A. T. Stewart & Co. against Kerrison & Leiding. It is claimed by the appellants, that this judgment is void, on account of certain irregularities, and is a mere nullity. The theory set up in their answer is, that the writ was sued out of the Circuit Court; that the declaration and pleas were filed, and issue joined in that Court at Charleston, and that the verdict was obtained and judgment entered up at Greenville, in the District Court for the Western District of South Carolina, which Court, it is asserted, had Circuit Court powers only for causes arising and being prosecuted or sued within the said Western District. It is further claimed that this Court had no cognizance of, or jurisdiction over, the said cause, which was a cause not arising, pending, or sued in the Western District, but a cause in a different district, and a higher Court—that is to say, in a Circuit Court of the United States, holding its terms and sessions at Charleston and Columbia only.

The appellees contend, on the other hand, first, that all the proceedings were in the District Court, where the verdict was rendered and the judgment entered; and second, that even supposing the writ to have issued out of the Circuit Court, and the issues to have been joined in that Court, the subsequent proceedings amount practically to a transfer of the case, by consent, from the Circuit Court to the District Court, with Circuit powers, and that the judgment of that Court is final and conclusive upon all other Courts.

The question is one of great and far-reaching importance. The admitted facts in the case are, that the two Courts, from the organization of the District Court with Circuit powers, in 1856, down to 1872, were always regarded by the profession throughout the State as one and indivisible—that writs were tested at Greenville, returnable, as other writs were, to Rules Days in Charleston, where only Rules Days were held—that the records of all the Courts were kept together at Charleston, no provision having been made by the Acts of Congress for keeping them at any other place—that cases sued out of the District Court, acting as a Circuit Court, and those sued out of the Circuit Court proper, were always placed upon the same docket, and that this docket was invariably called peremptorily at Greenville, Charleston, and Columbia.

The evidence shews that this practice was introduced by the Judge who then presided over the District Court, and at whose instance the Act of 1856 was passed. It has prevailed to an indefinite extent; public opinion has conformed to it; in innumerable other cases similar judgments to that under consideration have been taken; titles without number depend upon it, and a decision declaring this judgment null and void, would upset one-half of the judgments and decrees rendered in the Federal Courts for the District of South Carolina, for a period of sixteen years, would have all the effects of *ex post facto* legislation, and amount to an act of confiscation by wholesale. It would require strong reasons to induce any Court to adopt a conclusion leading to such results. We propose to show that the position taken by the counsel for the other creditors is not founded either in principle or in authority.

We do not concede that the Courts for the Eastern and Western Districts are separate Courts, so far as the circuit business is concerned. But we forbear to argue that point at this time, because we regard it as wholly unnecessary for this case.

Nor do we by any means concede, what is so confidently claimed, that a part of the record is in one Court and a part in another. On the contrary, we contend that there is nothing in the exemplification of the judgment filed as an exhibit to the bill which is irreconcilable with the idea that every step in the proceedings, from the emanation of the writ down to the judgment, was taken in the District Court of the United States for the Western District of South Carolina. Stress will be laid by appellant's counsel upon the fact that the certificate appended to the exemplification shews that the record was on file in the office of the Circuit Court, at Charleston, but it will be borne in mind that all the records of both Courts were kept at Charleston, no other place for keeping them having been provided, either by Congress or by the Court.

It is clear that the writ was issued out of that Court, for it is tested at Greenville, a place which was without the jurisdiction of the Circuit Court, if the view contended for on the other side be correct. It is tested, it is true, in the name of the Chief Justice; and the Act of Congress requires that all writs issuing from a District Court shall bear test of the Judge of such Court; but this, we apprehend, applies only to the process issued by the District Court when exercising its ordinary powers, and not to such process as it issues by virtue of its extraordinary powers as a Circuit Court. The Act of Congress conferring Circuit powers upon this Court, expressly enacts, that it shall proceed in the same manner as a Circuit Court. Does not this apply to the test of the writ, as well as to other proceedings in the case? This, at least, was the construction placed upon it by the Bar in South Carolina, and to which the practice in that State has always conformed. If it be said that the mandate of the writ requires the defendants to appear before the "Clerk of the Circuit Court," at Rules to be holden in Charleston, we reply that it is an admitted fact that Rules Days were held only at Charleston, where the Clerk of the District Court for the

Western District (who was also the Clerk of the Circuit Court) resided.

If it be objected that the writ and declaration are both entitled, as of the Circuit Court, the answer is obvious, that this was done to show that the cause was one in which the Circuit Court powers of the District Court were to be brought into operation. It is no forced or violent construction of the language employed to say, that the words "Circuit Court," wherever they occur in the writ and declaration, were meant to designate the District Court, sitting as a Circuit Court. In ex parte State Ins. Co., 18 Wallace, 417, it was held that the words "next Circuit Court," in the Judiciary Act, included a District Court exercising Circuit Court powers. The construction contended for by the appellees preserves the symmetry of the record, and obviates the objections to the validity of the judgment which have been raised and pressed by Counsel. It should therefore be adopted. Objections of this character, not taken at the usual stage of the proceedings, but sprung upon a party after an apparent waiver of them by his adversary, and still more after a trial upon the merits, can have no claim to the favor of the Court. "It was to prevent the mischief ensuing from such a course," says the Supreme Court, in Roach vs. Hewlings, 16 Pet., 322, "that statutes of jeofails have been enacted, and their salutary influence is invoked whenever the intrinsic merits of parties litigant would, without that influence, be sacrificed to mere modes and forms of practice." By the 32d Section of the Act to establish the judicial Courts of the United States, it is provided, "that no summons, writ, judgment, or other proceedings in civil causes, in any of the Courts in the United States, shall be abated, arrested, or reversed for any defect or want of form; but the said Courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, etc., except those only in cases of demurrer, which the party demurring shall specially set down, with his demurrer, as the cause thereof." The proceedings in this cause were according to the right of the case. They brought into view the real merits of the parties litigant before the jury; they are, there-

fore, within the terms and intent of the statute, and ought to be protected thereby.

But conceding that the writ was issued, and the declaration filed, and issue joined in the Circuit Court, and that the trial took place in the District Court for the Western District, we still contend that the judgment cannot, on that ground, be vacated.

In support of this view, we say:

I. That what was done was practically a transfer of the case, by consent, from the Circuit Court to the District Court, with Circuit powers, and that the judgment in question having been rendered by a Court having jurisdiction over the subject-matter of the suit, and also over the judgment defendants, is valid and binding.

That the District Court had jurisdiction over the subject-matter of the suit, seems to be too clear for argument. By the Act of August, 1856, conferring Circuit Court powers upon the District Court, it is expressly provided, that that Court "shall have jurisdiction of all causes (except appeals and writs of error) which now are or may be hereafter made cognizable in a Circuit Court of the United States." Its jurisdiction was not limited, as is contended, "to causes arising, pending or sued in the Western District." These words occur in the Act of 1823, and refer to the jurisdiction of the District Court sitting only as a District Court, and not as a Circuit Court. Indeed, it is worthy of remark, that there is no clause in the Act of 1856 requiring transitory actions to be brought in the District where the defendant resides. This was done by apt words in the Acts establishing such Courts in Alabama and Georgia. Brightley, 31, § 23 and 299, § 6.

In determining, therefore, whether the District Court had jurisdiction of the subject-matter of this suit, it is only necessary to inquire whether it was a cause cognizable in a Circuit Court of the United States. What was the nature of the suit? It was a suit of a civil nature, at common law, where the matter in dispute exceeded five hundred dollars, instituted by citizens of New York against citizens of South Carolina, in which latter State the suit was brought. That under the Judiciary Act, the

Circuit Court had jurisdiction of the subject-matter of such a suit, is a proposition which cannot be made clearer by argument, and if this be so, then the jurisdiction of the District Court for the Western District of South Carolina cannot be seriously questioned. That it had also jurisdiction over the judgment defendant is, we think, equally clear.

It has been settled by repeated adjudication, that a question of jurisdiction founded on a personal privilege should be brought to the consideration of the Court at the earliest opportunity, and if this is not done it will be held to have been waived. Wick vs. Samuel Strong, 6 McLean, 587; Kendall vs. United States, 12 Peters, 526.

In Voorhees vs. The Bank of the United States, 16 Peters, 471, the Court says: "It is among the elementary principles of the Common Law, that whoever would complain of the proceedings of a Court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into Court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the Court, he must move to set them aside for irregularity, or, if there is any defect in the form or manner in which he is sued, he may assign those defects specially. But if he pleads to the action generally, all irregularity is waived, and the Court can decide only on the rights of the parties to the subject-matter of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded." In Kendall vs. United States, 12 Peters, at page 623, the Court says: "No Court can, in the ordinary administration of justice, in common law proceedings, exercise jurisdiction over a party, unless he shall *voluntarily appear*, or is found within the jurisdiction of the Court, so as to be served with process. Such process cannot reach the party beyond the territorial jurisdiction of the Court. But this is a personal privilege, which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause." In Mays & Horner vs. Frittin, 20 Wallace, 418, this Court says: "It is not competent to a

party to assent to a proceeding in the Court below, take his chance of success, and, upon failure come here and object that the Court below had no authority to take the proceeding."

No such objection was made to the jurisdiction of the Court in the present case at any stage of the proceedings. On the contrary, it is conceded that the defendants not only appeared, but that the case was argued before the jury by their Counsel, without any objection to the jurisdiction. When, therefore, it is said that the District Court "had no right to require the attendance of Kerrison & Leiding at Greenville, or to submit to a trial there," it is a sufficient answer, that Kerrison & Leiding themselves waived any such objection, when it could properly have been made, appeared voluntarily in the Court and submitted to its jurisdiction, and that they cannot now, even if they wished to do so, be permitted to question the right of the Court to hear and determine the case after verdict found and judgment entered against them.

But it is contended that the parties could not, by any act or consent of theirs, confer a jurisdiction upon the Court which it had not by law. Undoubtedly a judgment pronounced by a tribunal having no jurisdiction over the subject-matter, is necessarily and incurably void, and may be shown to be so, in any collateral or other proceeding, in which it is drawn in question.

Thus, a criminal information in the Court of Common Pleas, or a common recovery or writ of right in the King's Bench, would be simply void, and it would not be competent for the parties, by any act of theirs, to cure the defect. And so in the United States Courts, if both plaintiff and defendant were citizens of the same State, consent could not confer jurisdiction. But that is not the case here—the Court had jurisdiction both over the parties and the matter in dispute. If it be contended that in such a case the voluntary appearance of a party in the Court would not authorize a judgment against him because his appearance could not have been compelled, it is sufficient to say that the law has been settled the other way, by repeated decisions of the Supreme Court. Thus, in the case of Toland vs. Sprague, Peters 12, page 300, it was held that a party against whose property a foreign attachment had issued in a Circuit

Court of the United States, although the Circuit Court had no right to issue such an attachment, having appeared to the suit and pleaded to issue, could not afterwards deny the jurisdiction of the Court; that he had, as a personal privilege, a right to refuse to appear; but it was also competent to him to waive the objection. "If," said the Court, "the case were one of a want of jurisdiction in the Court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The Court had jurisdiction over the parties and the matter in dispute. The objection was that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now, this was a personal privilege or exemption, which it was competent for the party to waive."

But it it said that Kerrison & Leiding, in giving their attendance upon the District Court at Greenville, and submitting to the trial there, "upon the judicial demand and requisition of a Judge and a Court claiming submission to its orders, and authority to enforce such orders, cannot be said to have waived any lawful objection to the unauthorized action of the Judge and Court, or to have consented to anything on their part which they might otherwise have had the right and power to consent to."

To this argument there are two answers, either of which is conclusive:

1st. That the objection to the jurisdiction not having been made, the defendants cannot, with any propriety, be said to "have submitted to the trial upon the judicial demand and requisition of the Court."

2nd. That had it been made and ruled against the defendants, they could have excepted to such ruling; and if erroneous, it could have been corrected upon appeal, or writ of error, by the proper appellate tribunal. Whatever, therefore, was done by the defendants, was done freely, voluntarily, and without compulsion.

The case of Toland vs. Sprague, already cited, is directly in point. There the defendant, whose property had been attached, as soon as he could, made an application to the Circuit Court to quash the attachment, which the Court refused to do. He then put in an appearance, and it was contended by his counsel that as the appearance was an enforced one, he could not thereby be estopped from claiming the benefit of any privilege to which he was originally entitled; but this objection was overruled by the Court upon the ground that the party had not placed the objection upon the record in such a form as would enable the Supreme Court to revise the decision of the Court below.

It follows, therefore, that in this case there was no want of jurisdiction, either as to the person or to the subject-matter. If, then, Kerrison & Leiding had at the same term of the Court, at which it was rendered, moved to set aside the judgment on the ground of supposed want of jurisdiction, or had sought within five years to reverse it by an appeal or bill of review, they could not have succeeded.

II. If, however, the positions we have taken be untenable, then we contend, in the next place, that the judgment in question, having been rendered by a Court of limited but not of inferior jurisdiction, is not void, but only voidable; that it is binding until reversed; and that the alleged errors and irregularities, if they exist, cannot be inquired into collaterally, but must be corrected by some direct proceeding, either before the District Court, in which the judgment was rendered, or by an appeal. This point can be disposed of chiefly by adjudged cases, without any labored examination of the principles involved.

In the case of Thompson vs. Tolmie, 2 Peters, 162, where the regularity of proceedings made by certain commissioners appointed under the Act of the Assembly of Maryland, were drawn in question, Justice Thompson, in delivering the opinion of the Court, says:

"The counsel for the defendant in error have in the argument considered these proceedings open to the same examination and objections as they would be in an Appellate Court, on a direct proceeding to bring them under review. This, however, is not the light in which we view the question now before us.

These proceedings were brought before the Court collaterally, and are by no means subject to all the exceptions which might have been taken in a direct appeal. They may well be considered judicial proceedings. They were commenced in a Court of justice, carried on under the supervising power of the Court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them, that the subject-matter was within the jurisdiction of the Court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same Court, to set them aside, or in an Appellate Court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no rights, and afford no justification, and may be rejected when collaterally drawn in question."

In Voorhees vs. The Bank of the United States, 10 Peters, where a judgment of a State Court, founded on proceedings in attachment, was sought to be assailed collaterally on the ground that the requirements of the statute regulating attachments, had not been complied with, Justice Baldwin, delivering the opinion of the Court, said: "So long as this judgment remains in force, it is, in itself, evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment. The errors of the Court, however apparent, can be examined only by an appellate power."

In the Bank of the United States vs. Moss, 6 Howard, 31, which was a writ of error, to revise the decision of the Circuit Court, setting aside a judgment recovered at a previous term, on account of a supposed want of jurisdiction, Judge Woodbury, speaking for the Court, says:

"The only relief for errors in law in such cases is usually by new trial, bill of review, writ of error, or appeal, as either may be appropriate and allowable by law, or some other mode specially provided by statute. Besides these remedies, judgment entered up by fraud may, on due notice by *scire facias* or otherwise, be vacated at a subsequent term by the same Court, or, if offered in evidence, be deemed a nullity, should fraud be clearly proved to have taken place."

"But the present judgment was neither fraudulent nor void on its face, nor even voidable. Had it been rendered on the special counts alone, it might have been voidable by a writ of error, for not alleging jurisdiction in the pleadings. But it has been repeatedly settled that even then, without any plea to the jurisdiction, and after a verdict for the plaintiff on the general issue and final judgment, it is not a nullity, but must be enforced till duly reversed, because it would be a judgment rendered by a Court not of inferior, but only limited jurisdiction, and *the merits would have been investigated and decided by consent.*"

In Kennedy vs. Georgia State Bank, 8 Howard, 586, after a final decree had been made by consent, one of the parties joining his assignee in insolvency, and sundry of his creditors, alleged to be interested, brought a bill to set aside the decree for defect of jurisdiction. But the Court held that the judgments and decrees of Circuit Courts are binding until reversed, though the record does not show jurisdiction, and though they were erroneous and might have been reversed by an appeal or a bill of review within five years from the final decree.

III. That whatever right Kerrison & Leiding may once have had to set aside this judgment, by direct proceedings, is barred by the lapse of time.

A motion to set aside this judgment could not now be entertained in the District Court in which it was rendered, for in Bank of the United States vs. Moss, 6 Howard, 37, it was held "that after a Circuit Court has adjourned without day, it has no power to set aside its own judgment, even for want of jurisdiction." Nor could a writ of error be brought; for more than five years had elapsed between the rendering of the judgment (28th September, 1868,) and the filing of the answer of Paton & Co., (30th December, 1873,) which seeks to impugn it, and the parties cannot be permitted to do by indirection what they cannot do directly.

"That some sanctity," says the Supreme Court, in Voorhees vs. Bank of United States, 10 Pet., 473, "should be given to judicial proceedings, sometime limited beyond which they should not be questioned, cannot be denied. * * * No rule can be more reasonable than that the person complaining of injury

done him should avail himself of his legal rights in a reasonable time, or that that time should be limited by laws. This has wisely been done, by Acts of Limitation on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion." * * * "Acts of Limitation become useless, if a defendant is allowed to evade them by avoiding judgment or execution, on the suggestion of defects or omissions in the record, which can be reviewed only by an Appellate Court. A direct premium is held out for delaying the resort to the mode pointed out by law for correcting the errors of judicial proceedings."

IV. But we deny the right of the creditors of Kerrison & Leiding to raise, either now or at any other time, either in this Court or elsewhere, the question raised by their answer. If there were irregularities in the proceedings in the District Court, the only persons who could take advantage of them were the judgment debtors. Kerrison & Leiding, the defendants in that suit have never complained. They have acquiesced in the decision of the tribunal to which they had voluntarily submitted themselves and their rights. So far from denying the validity of this judgment, they have expressly recognized it on all occasions, and notably in the answer filed by them in the equity suit instituted in the State Court for the purpose of setting aside the trust deed referred to in the pleadings. (See their answer.) Nearly six years after the final and conclusive settlement of the whole matter in controversy, the creditors of Kerrison & Leiding undertake to set up on their behalf a personal privilege, which they themselves had never claimed. This they have no right to do. It is a well settled rule that third persons cannot have a judgment set aside, except for fraud or collusion. Every litigant, if an adult, is presumed to understand his own interests and to be fully competent to protect them in Courts. He has the right to waive all irregularities in proceedings by which he is affected, and is entitled to decide exclusively upon the propriety of such waiver. To allow third persons to interpose in his behalf, and to undertake the management of his business, according to their judgment, would create intolerable confusion

and annoyance, and produce no desirable result. Therefore, if the defendant be the real as well as the nominal party affected, as long as he is satisfied with the judgment, all other persons must be. Freeman on Judgments, § 91.

In Hauer's Appeal, 5 Watts and Sergt. 473, it was held that a judgment entered in the District Court by virtue of a warrant of attorney authorizing the entry of a judgment in the Court of Common Pleas, would not be set aside as erroneous at the instance of a subsequent judgment creditor. "A creditor" says Gibson, J., "may abate a fraudulent judgment for a pretended debt, but he cannot abate an erroneous one for a *bona fide* debt. Want of authority to confess a judgment concerning as it does only the parties to it, may be supplied by subsequent ratification."

In Drexel's Appeal, 6 Barr, it was held that an actual, but irregular, judgment entered in the records of a Court without authority, can only be revised on a writ of error or set aside in the Court below on motion, but only on the instance of the defendant. "As long as the party injured by the irregularity submits to it, no one else can complain, for a third party has a right to interfere with a judgment only where it is collusive."

The same rule is recognized by this Court in Adams vs. Preston, 22 How., 473.

The case of Vose *vs.* Morton, 4 Cush., 27, which will be relied on by the other side, will be found, on examination, not to be in conflict with the doctrine established by the cases we have cited. The judgment which was collaterally assailed in that case had been recovered in the Federal Courts by a nominal plaintiff, the entire interest in the note sued upon being, in reality, in other parties, who, like the defendants, were citizens of Massachusetts. It was, therefore, properly held that the judgment was absolutely void, and that third parties were not concluded by it.

The general expressions in Judge Shaw's opinion are to be taken in connection with the case in which they are used, and cannot be relied on as authority, unless the case called for their expression. Cohen *vs.* Virginia, 6 Wheaton, 392.

V. We submit that the validity of this judgment was one of the points necessarily decided in the equity proceedings insti-

tuted to set aside the trust deed made by Kerrison & Leiding to Charles Kerrison, trustee, and that that matter cannot again be brought into controversy, either by the parties to that suit or their privies.

It is a well settled rule that a judgment is conclusive as to all matters necessarily entering into an adjudication, though not there directly the point in issue. If the facts involved in the second suit were so cardinal that without them the former decisions could not have been made, they must be taken as conclusively settled. This rule is well illustrated in the case of Regina vs. Hartington, 4 El. and Bl., 780. In that case, in an order of settlement, John Gould and Wm. Gould were adjudged to be the lawful children of Wm. Gould and Esther Gould, and to have their settlement in a certain township. Afterwards a contest arose in relation to the settlement of Esther Gould, whereupon it was considered that as the settlement of the children depended on that of their father and on his marriage with their mother, Esther, the father's settlement and marriage must have been decided as the ground-work of the former order, and that as those facts which upheld the order of settlement of the children were necessarily applicable to their mother, her settlement was fixed by the decision in relation to that of her children.

It will be seen, by reference to the proceedings in the case, that the Circuit Decree expressly finds that Stewart & Co. had recovered and then held a judgment in the Circuit Court of the United States against Kerrison & Leiding, for $9,387.77-100, which was entered on the 19th September, 1868.

Much argument is certainly unnecessary to show that this was a matter necessarily entering into the adjudication, and without which the decree could not have been made, for Paton & Co. and their co-defendants assert, in their answer, "that the said decree was given upon the allegations of the bill of complaint of the said A. T. Stewart & Co., among which was the material allegation, without which their complaint could not have been sustained, that they, the said Stewart & Co., had recovered and, at the time of their bill filed, had a judgment in the Circuit Court of the United States, upon

which they had sued out an execution of *fieri facias* which had been returned *nulla bona.*" It follows, therefore, that the validity of this judgment is *res adjudicata*, and is no longer an open question to the defendants if they are bound by the decree made in that case. We proceed to show that they are so bound.

VI. We submit that the decree establishing the validity of the Stewart judgment, and setting aside as fraudulent the trust deed executed by Kerrison & Leiding to Charles Kerrison, is binding on the trustee, and also on all creditors claiming an interest thereunder as *cestui que trusts.*

The general rule, undoubtedly, is that trustees and *cestui que trusts* are owners of the whole interest in the trust estate, and, therefore, in suits, in equity in relation to the estate, by or against strangers, both the trustees and *cestui que trusts* must be parties representing that interest; the rule is, however, subject to several exceptions, which are as well established as the rule itself.

1st. One exception to the rule is, that where the parties in interest are so numerous that it would be difficult or impracticable to bring them all before the Court, and the interest involved in the suit may be fairly and fully represented and tried without joining them, a strict adherence to the general rule is not required. This is true in all cases in which certain parties to a suit are entitled to be deemed the full representatives of the legal and equitable rights of many persons, so as to bind their interests under the decree, although they are not parties. In Story, on Equity Pleading, § 150, that distinguished Jurist uses this language: "It has been laid down by Lord Redesdale, as a general rule, that when any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they are trustees, which in many cases would be impossible. *And the rights of the creditors or legatees will be bound by the decision of the Court,* when fairly obtained, for or against the trustees. In such cases the trustees, like executors, are supposed to represent the interests of all persons, creditors or legatees. Indeed, the impracticability of making the other persons parties, would seem, of itself, a sufficient ground for dispensing with them."

How large the number must be, in order to dispense with calling them all before the Court, has never been determined. The rule has been adopted on the ground of convenience, and every case must be governed by its own circumstances.

In Harrison vs. Stewardson, 2 Hare, 533, where there were twenty-one *cestui que trusts*, the Court required them all to be joined; but this case was shaken, if not overruled, in Smart vs. Bradstock, 7 Beavan, 500. In that case a bill was filed by some creditors on behalf of the rest, when the parties, interested under the deed were twenty-seven in number, and it was held that the absent parties were sufficiently represented. "The parties," said the Chancellor, "were twenty-seven in number twenty years ago; there is no telling what number they may amount to at the present time." This decision was approved and followed in the subsequent case of Bateman vs. Marginson, 7 Beavan, 496. In that case property was conveyed to four trustees for such of the creditors of a firm as should execute the deed, and twenty-one creditors (including the four trustees) executed the deed. A suit, instituted by some of the creditors on behalf of themselves and the others, was sustained against the trustees, they objecting that it was defective for the want of the other creditors as parties.

These cases show that while the *cestuis que trust* may be proper, they are not necessary parties, and that the question whether they should be made parties is one of mere convenience, to be decided by the Court upon the particular circumstances of each case. If the Court has reason to believe that the trustees are unfaithful or that the issues are not regularly joined or fully discussed, it may and should refuse to proceed until the persons beneficially interested have been brought before it. Smart vs. Bradstock, 7 Beavan, 500. Bateman vs Marginson, 6 How., 496. Harrison vs. Stewardson, 2 How., 533, and all the cases cited in the appellants, brief, will be found on examination to fall within this category. We have found no case, and it is believed that none can be found, in which it has been held, that the *cestui que trusts* are not bound by a judgment rendered against a trustee selected to hold and represent the property to the same extent that creditors and legatees are bound

in suits concerning personal estate by a judgment rendered against the executor or administrator. The 49th Rule of this Court recognizes the distinction for which we are contending, and is wholly irreconcilable with the views now urged by the appellants' counsel.

2d. If the object of the deed is to secure bonds or notes which are negotiable, the rule requiring the *cestui que trusts* to be made parties as well as the trustees, is always dispensed with upon the ground that in such cases it would be very difficult, if not wholly impracticable, to ascertain with accuracy, at any given time, who were the owners of them, so as to make them all parties to a suit in equity. Shaw vs. R. R. Co., 5 Gray, 170.

3d. A third exception to the general rule is, that when the complainant claims, in opposition to the assignment or deed of trust and seeks to set it aside on the ground that it is fraudulent and void, he is at liberty to proceed against the assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trusts*, and the rights of the creditors will be bound by the decision of the Court.

In his work on Remedies and Remedial Rights, at § 357, Mr. Pomeroy thus lays down the rule:

"There is a broad distinction between the case of an action "brought in opposition to the trust to set aside the deed or "other instrument, by which it is created, and to procure it to "be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as "valid, or to procure it to be wound up and settled. In the "first case the suit may be maintained without the presence of the "beneficiaries, since the trustees represent them all and defend "for them. In the second, all the beneficiaries must be joined, if "not as plaintiffs, then as defendants, so that the whole matter "may be adjusted in one proceeding, and a multiplicity of suits "avoided." "The reason of this distinction is obvious. It "is, that any one person interested in opposition to the trust "has a right to test the validity thereof, and his voluntary action "cannot be controlled by the will of others, while the trustees "themselves are sufficient to represent and defend all the inter-

"ests of those, who claim under the trust. But when the trust "is assented to, and the purpose is simply to carry out its pro- "visions, all the beneficiaries are alike interested in that object, "and in reaching that same result, and it is just to the trustee "that the controversy should be ended in one proceeding."

In Rogers *vs.* Rogers, 3 Paige, 379, Chancellor Walworth says: Neither was it necessary to make the creditors, for whose benefit the assignment was made, parties defendant. As a general rule, the *cestui que trust*, as well as the trustee, must be parties, especially when the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims, in opposition to the assignment of a deed of trust, and seeks to set the same aside on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trust.* Such has been the uniform practice of this Court in relation to cases of this description, and I see no good reason for adopting a different rule.

In Wakeman *vs.* Grover, 4 Paige, 33, the question again came before the same Chancellor, and, after hearing elaborate argument, he adhered to the rule laid down in Rogers *vs.* Rogers.

"It is insisted," said he, "by the defendants, that all the creditors whose debts are specifically provided for in the assignment are necessary parties to these trusts. If the complainants were seeking to carry into effect the assignment, and to obtain their share of the assigned property, it would undoubtedly have been necessary either that they should have made all the creditors parties, or they should have filed their bills in behalf of themselves and all others. But I apprehend the rule is different when the creditor is acting in hostility to the assignment, and is seeking to set it aside on the ground that the assignee is endeavoring to retain the property of the debtor under an assignment which is fraudulent and illegal. In such a case the creditor cannot file a bill in behalf of himself and those whose claim he is opposing. And it would be unreasonable to compel him to be at the expense of making all the creditors, whose claims are provided for by the fraudulent assignment, parties defendants. If the assignment is illegal, the

assignee has no claim to have the other creditors made parties for his benefit; and if it is valid, he is perfectly competent to defend himself without their assistance. The uniform practice in cases of this kind, so far as I have been able to discover from the reports, is to proceed against the fraudulent assignors or assignees, without making the numerous creditors, whose debts are provided for in the assignment, parties. In the case of Riggs and others *vs.* Murray and others, 2 John, Ch. R., 565, this course was pursued. The bill was filed in the same way in McMenomy *vs.* Murray, 3 John, Ch. R., 435. The bills in the causes now under consideration are not properly framed to entitle the complainants to any relief unless they succeed in shewing the assignment illegal and fraudulent as against them, and if that ground of relief can be established the creditors whose claims are provided for in the illegal and void assignment are not necessary parties."

The rule laid down in these cases was reaffirmed in Loomis vs. Cline, 4 Barbour, 453, and in Bank of British North America vs. Sudam, 6 Howard Practice R., 380: In the latter case Roosevelt, Justice, in delivering the opinion of the Court, says; "Had this been a suit to establish and carry out the assignment, the objection would have been well taken. Each separate creditor cannot bring a separate suit for his portion of the trust fund, thus compelling the assignee to account over and over again. Whoever sues must sue in behalf of all, so that the accounting once had may conclude all. Not so where a creditor seeks to set aside an assignment. In that case the assignee represents all the creditors interested in the trust. His defence is their defence, in the same manner as an executor represents the estate entrusted to him. As a matter of convenience, as well as principle, the courts have held in such case, that all the creditors need not be made parties. The case of Grover vs. Wakeman, 4 Paige, 23, and again reported on appeal, to the Court of errors, 11 Wendell, 189, settles this question."

In Winslow vs. Minn. R. R., 4 Minn, 313, it was held that in an action to set aside a trust deed, made by a Rail Road Company to a trustee, for the benefit of Bondholders, the beneficiaries under the trust were not necessary, or even proper parties. "The

defence of the trustee" said the Court, "is their defence, and their presence is not necessary to the protection of their interest." In Field vs. Flanders, 40 Ill. 470, it was held that a judgment against the assignee, in relation to property embraced in the assignment, bound the *cestuis que trust*, unless it could be avoided for fraud or collusion.

The reports of other States abound with similar decisions, which we deem it unnecessary to cite.

The case at Bar clearly comes within the principles on which these decisions rest.

1st. The *cestui que trusts* are very numerous. It will be seen, by reference to the schedule annexed to the deed, that thirty-five creditors had accepted its provisions in May, 1867, and others have since accepted. These creditors were firms composed of many individuals, whose names were unknown to the plaintiffs, and all of whom resided beyond the limits of the State.

2d. The notes secured by the deed were negotiable, and it was wholly impracticable to ascertain with accuracy, at the time the bill was filed, who were the owners of them. All of the creditors who signed the deed have been made parties to these proceedings by publication. Only eight out of the thirty-five have appeared and answered. The reasonable presumption is, that the others have parted with their securities. What guarantee have we that all the *cestui que trusts* are even now before the Court, or can ever be brought before it?

3d. The plaintiffs in the equity suit instituted by Stewart & Co. vs. Kerrison, trustee, were claiming in hostility to the assignment, and were seeking to set it aside on the ground of fraud.

4th. The trustees had no adverse claims against their *cestui que trusts;* the main purpose of the deed was to vest the property in the trustee, with full power and authority to act as the representative of the creditors in all things relating to their common rights and interests. There is no pretence of fraud or collusion.

We, therefore, submit that on all these grounds the creditors were not necessary or proper parties to the suit; that their rights are bound by the decision of the State Court, fairly obtained

against the assignee, and that they are estopped from denying that the judgment held by Stewart & Co. is a valid judgment, or that the deed under which they claim is an illegal and void deed.

VII. Even if the other creditors are not bound by the decree of the State Court, it is at least certain that Paton & Co., and Benkhard & Hutton, are bound, and that Stewart & Co. have a right to receive any dividends out of the trust property, to which they would have been entitled had the deed been sustained.

They were made parties to the cause by publication, in accordance with the provisions of the Statute of South Carolina. It is true that by the Act they had two years, from and after the decree, to come in and show cause against it. But this right they have never seen fit to exercise. The Circuit decree was made on the 22d June, 1870. From that decree no appeal was taken by either Paton & Co. or Benkhard & Hutton. As against them, the decree was, therefore, final, and the time limited by the Act expired on the 22d June, 1872. But it is too clear for argument that an application for that purpose, whenever made, could only be addressed to the Court in which the decree was made, and that this Court has no right to entertain it. How their right to apply to the State Court to set aside the decree, as against them, can be affected by the subsequent bankruptcy of their co-defendants, Kerrison & Leiding, as alleged in their answer, or how that bankruptcy can confer any jurisdiction over that question upon this Court, it is difficult to perceive.

In the appellants' brief the position is taken that the judgment of the State Court is not binding upon Paton & Co. and Benkhard, Hutton & Co., because the record does not shew that the provisions of the Act under which they were made parties by publication, were complied with. It is conceded that this objection was not taken in the argument below, and it will be seen by reference to the Record, that it is not raised by the pleadings. It is therefore submitted that the objection cannot be taken for the first term in this Court, the more especially as the record of the State Court is not now

before this Court, the case having been tried on the Circuit upon the bill and answers, and the statement of facts agreed upon.

VIII. Should it be decided by the Court that the foregoing points are not sustainable, and that the merits of the controversy between the parties are open for examination, then it is contended, in behalf of the judgment creditors:

1st. That the trust deed was set aside by the Supreme Court of the State upon the ground that it was obnoxious to the statute of 13th Elizabeth, which declares all conveyances made with "purpose and intent to delay, hinder, or defraud creditors, to be clearly and utterly void, frustrate, and of none effect."

2d. That this statute, having been made of force in this State, is, to all intents and purposes, a statute of the State of South Carolina.

3d. That it is a well-settled rule that in cases depending on the statutes of a State, the Federal Courts will adopt the construction settled in the State Courts. 5 Cranch, 22, and Reports of Supreme Court, *passim*.

4th. That upon this ground, even if the decision made by the Supreme Court of the State had been *res inter alios acta*, so that it would not operate by way of estoppel, it would still be a binding authority upon this Court.

IX. That the decision of the State Supreme Court in Stewart vs Kennion 3 Rich. S.C.N.S. 266. is a correct exposition of the Law for the reasons therein stated. S. Lord Jr.